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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1418

MADELINE BUCHANAN, ET AL.,
Appellants,

vs.

BRENDA EVANS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

INTRODUCTION.

The defendants and intervening defendants appeal from the order of the three-judge District Court for the District of Delaware entered on 16 April 1975 ordering the defendants to provide an interdistrict desegregation plan and enjoining the enforcement of the Educational Advancement Act of 1968, 14 Del. C. §§ 1004(c)(2) and 1004(c)(4). A copy of the order is set out in Appendix B, attached hereto. [App. A46]

OPINIONS BELOW.

The majority and dissenting opinions in the three-judge District Court for the District of Delaware are not yet reported.

They are set out in Appendix A, attached hereto. [App. A1] (An earlier opinion, reaching the same conclusion, but rendered before the judgment of this Court in *Milliken* v. *Bradley*, 418 U. S. 719 (1974), may be found at 379 F. Supp. 1218.)

JURISDICTION.

The judgment of the three-judge court was entered on 16 April 1975. Appellants filed Notice of Appeal in the district court on 22 April 1975. A copy of the Notice is set out in Appendix C, attached hereto. [App. A48] This Court has jurisdiction pursuant to 28 U. S. C. § 1253.

STATUTE INVOLVED.

Sections 1004(c)(2) and 1004(c)(4) of the Education Advancement Act of 1968, 14 Del. C. § 1001 *et seq.*, provide as follows:

> (c) On or before March 1, 1969, the State Board of Education shall meet and adopt a final plan of reorganization of school districts which it deems wise and in the best interests of the educational system of this State; provided, that no plan of reorganization of school districts shall be adopted which fails to meet the following requirements:
>
> . . . .
>
> (2) Each proposed school district including more than one component former school district shall have a pupil enrollment of not less than 1900 nor more than 12,000 in grades one through twelve. "Pupil enrollment" as used in this subsection means enrollment as of September 30, 1968. Excluding vocational-technical districts there shall be no fewer than 20 nor more than 25 reorganized school districts.
>
> . . . .
>
> (4) The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits.
>
> . . . .

QUESTIONS PRESENTED.

1. Should a case, indistinguishable in law and fact from *Milliken* v. *Bradley*, 418 U. S. 719 (1974), and *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058 (CA 4th, 1972), *aff'd by equally divided Court*, 412 U. S. 92 (1973), be decided contrary to the judgments in those cases?

2. Is a statute with the purpose and effect of consolidating small school districts to reach optimal size, presumptively invalid because, without racial motivation or effect, and without any racial classification, it also establishes maximum population for school districts and confines a city school district to long-established city boundaries?

STATEMENT.

Like Detroit,[1] like Richmond,[2] like Indianapolis,[3] like Grand Rapids,[4] indeed, like almost every major American city,[5] Wilmington, Delaware has witnessed an increased concentration of blacks within the city and a white population growth in its suburbs. The consequence of this all but universal demographic pattern is that the school populations of central cities are becoming predominantly black and proportional representation of black and white students within each city school causes those schools to have predominantly black majorities.

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1. See *Milliken* v. *Bradley*, 418 U. S. 717 (1974).

2. See *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058 (CA 4th, 1972, affirmed by an equally divided Court, 412 U. S. 92 (1973).

3. See *United States* v. *Board of School Commissioners of the City of Indianapolis, Indiana*, 503 F. 2d 68 (CA 7th, 1974), cert. den. 43 U. S. L. W. 3569, 21 April 1975.

4. *Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F. 2d 779 (CA 6th, 1974).

5. See U. S. Dept. of Census, Statistical Abstract of the United States, 1974, pp. 866-67, 886-87, 906-07 (95th Annual Edition), Washington, D. C., 1974.

The real question presented by these city/suburban cases is whether black majority school systems are ipso facto unconstitutionally segregated. The courts have consistently held, see notes 1-4, that black majorities in cities and white majorities in suburbs do not require state action or judicial intervention to secure a "better" racial mix between city and suburbs. This Court held, in the *Detroit* case, that emerging black majorities in city schools did not, absent "interdistrict constitutional violations," violate the Fourteenth Amendment or the principles established by *Brown* v. *Board of Education*[6] and its subsequent judicial explications.

Like the *Richmond* case,[7] this case represents the latest phase of a litigation that dates back to *Brown* v. *Board of Education* itself. After a series of remedial orders through 1962, 207 F. Supp. 820 (D. Del. 1962), none of which challenged desegregation in the Wilmington school district, the case remained dormant until this call for a metropolitan remedy. The cause for its revival may be found in the facts that, as with most American cities, Wilmington's black population has greatly increased in proportion to the white population and this proportional difference is even greater when measured by school population rather than overall population.

Although Wilmington public schools have become predominantly black, there has also been a growth in the black school population in the Wilmington suburbs. According to the data found by the District Court, the number of black students in the schools of New Castle County outside of Wilmington has increased from 845 in 1954 to 3325 in 1964 to 4359 in 1973. But the District Court emphasis was on the local repetition of the national phenomenon that total white school population attending suburban schools had increased more rapidly than black.

6. 347 U. S. 483 (1954); 349 U. S. 294 (1955).
7. Note 2 *supra*.

After a trial on the merits, the District Court found that the Wilmington school district was not being operated as a unitary system and called for the submission of plans for remedy within the Wilmington school district as well as for plans for involving both the Wilmington school district and the other school districts in New Castle County. 379 F. Supp. 1218 (D. Del. 1974) (per Layton, J.). As of that time, 12 July 1974, the trial court had found no interdistrict violations.

Shortly after the trial court decision on 12 July 1974, this Court handed down its opinion in the *Detroit* case, *Milliken* v. *Bradley*, 418 U. S. 717 (1974). This Court's judgment was that no interdistrict remedy could be mandated by a district court in the absence of an interdistrict constitutional violation. "The view of the dissenters, that, the existence of a dual school system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." 418 U. S. at 747.

Following the *Milliken* decision, the three-judge court admitted the intervening defendants as parties and offered all the parties an opportunity to introduce additional evidence in light of the *Detroit* decision. All parties declined the opportunity. After additional briefing and oral argument, the trial court, with Judge Layton who had written the earlier opinion now in dissent, affirmed its earlier position and ordered the production of an interdistrict remedy and held as well that the Delaware Educational Advancement Act, 14 Del. C. §§ 1001 *et seq.*, was unconstitutional and enjoined its enforcement.

In this second opinion, based on the same record as the first, the trial court acknowledged—and then sought to evade—the rule of this Court that "racial imbalance" between city and

suburban schools does not afford a basis for federal court intervention to redress the balance by redrawing school district lines. It noted that this Court, in *Milliken* v. *Bradley*, had established as a condition precedent to federal court intervention the need for an interdistrict constitutional violation. According to the trial court, the essence of the holding in *Milliken* is found in three sentences:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann [v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971)], at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. [App. A4] [418 U. S. at 744-45].

Having stated the appropriate criteria, the three-judge court, or rather its two-man majority, proceeded to ignore them. There was no showing or finding "that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation."

The majority of the trial court did find that in earlier times, both blacks and whites were transported from suburbs to city where they were schooled in compliance with the *de jure* segregation that then prevailed in Delaware. But, so far as black students were concerned: "Sometime after *Brown I*, this interdistrict program ceased." [App. A8] And "in the year following *Brown I*, suburban white children were no longer sent to Wilmington schools." [App. A9] There is not even a hint in the opinion or findings that any transportation of students after *Brown I* was done with the purpose or effect of furthering segregation, which is the requirement established by *Milliken*.

The only suggestion offered by the trial court of a school segregation violation, if it is one, was entirely intradistrict. In the words of the majority below:

> Moreover, certain policies of the Wilmington School Board, although possibly designed to minimize the flight of white families with schoolaged children to the suburbs, may have had the opposite effect. The record indicates that optional attendance zones established by the Wilmington School Board after 1954 in several instances allowed white students to attend schools in attendance areas other than those in which they resided. One result of these optional attendance zones was to create a proportionately larger black school population in the transferor schools. The presence of proportionately more black children in a school than in the neighborhood served by the school may have encouraged white families to move out and discouraged white families from moving in. [App. A12-13]

In sum, there was no showing of any "constitutional violation within one school district that produces a significant segregative effect in another district . . . [or any] acts of the state or local school districts, or of a single school district [that] have been a substantial cause of interdistrict segregation." 418 U. S. at 744-45.

The trial court, not able to meet the requirements of *Milliken* for an interdistrict school violation, resorted, as had the trial courts in the *Detroit* case [see 338 F. Supp. 582, 587 (E. D. Mich. 1971), and in the *Richmond* case [see 338 F. Supp. 67, 212-29 (E. D. Va. 1970), to the proposition that an interdistrict remedy might be predicated on a finding of housing discrimination. But the trial court here was able to come up with even less by way of housing discrimination than had the courts in *Detroit* and *Richmond*, where this Court found similar arguments unpersuasive.

The best the trial court could do was to speak in generalities. "Government authorities condoned and encouraged discrimination in the private housing market and provided public housing almost exclusively within the confines of Wilmington."

[App. A24] So far as the state action required for a constitutional violation is concerned, it is alleged to consist of the continued registration of deeds with long-since invalidated and unenforceable restrictive racial covenants, with supplying licensed real estate brokers with copies of the Code of Ethics of the National Association of Real Estate Boards, a code which had suggested avoiding upsetting established neighborhoods—an admonition in part against "block-busting," and the erection of public housing where there was a demand for it, *i.e.*, in the city rather than the suburbs. For the rest, the alleged discrimination was based on a showing of a few isolated instances of private actions by private sellers and real-estate brokers.

Prior to the ruling of this Court in *Milliken*, the majority of the trial court eschewed the need to pass on the constitutionality of the Educational Advancement Act of 1968, 14 Del. C. §§ 1001 *et seq.* 379 F. Supp. 1218. Apparently recognizing the absence of justification for an interdistrict remedy in the school district actions or in the housing actions, and in the light of the *Milliken* decision, the trial court undertook to declare the state law unconstitutional and of interdistrict segregatory effect.

The statute under attack here, however, was segregatory neither in purpose nor effect. The recognized purpose and effect of the Educational Advancement Act was to reorganize school districts of the state into units of more optimal size as measured by what the trial court acknowledged to be valid educational standards. The purpose was largely to consolidate very small school districts in rural areas into districts of sufficient size to be operated efficiently. The sections found invalid by the trial court were §§ 1004(c)(2) and 1004(c)(4). Section 1004 (c)(2) "limited the maximum pupil enrollment in any proposed school district to 12,000." [App. A18] Two districts in the state were thereby precluded from consolidation with other districts by that provision. The school districts of both the City of Wilmington and the City of Newark had student

populations in excess of 12,000. "Wilmington had an enrollment of 15,026, of which 34% were white and 66% were black. [App. A18] "The Newark enrollment was 97% white and 3% black." [App. A18]

Section 1004(c)(4), the other section that was invalidated, provided: "The proposed school district for the city of Wilmington shall be the City of Wilmington with the territory within its limits." This was the district as defined since 1905. Wilmington representatives, black and white, in the legislature had demanded its preservation.

Of the statute, the trial court acknowledged:

> We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington School District from school reorganization were purposefully racially discriminatory. . . . the focus of the legislature's concern in developing the consolidation provisions of the Educational Adavncement Act was on small, weak, ineffective school districts . . . [I]t is clear that Wilmington had larger staffs and better programs than many Delaware school districts. Moreover, Wilmington had historically been treated distinctively in Delaware education, and there is evidence that its representatives were unwilling to forego certain aspects of this special treatment. No language in the provisions at issue makes any reference to race, nor evidently, did the legislative debates over the Act contain any reference to race. Finally, all Wilmington legislators, black and white, voted for the Educational Advancement Act. In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization. [App. A19-20]

Despite the fact that the statute itself made no racial classification, and was without racial motive or effect, the trial court held: (1) that the statute could have been—not that it had been—put to uses with segregatory effect and was, therefore, constitutionally suspect; and (2) that, although the statute had, in fact, not caused any interdistrict segregatory con-

stitutional violation, it supplied the necessary predicate for an interdistrict remedy.

Thus, although there is no racial classification in the statute, the court itself created a racial classification[8] by inference. That racial classification purportedly precluded a purely hypothetical joinder of Wilmington, heavily black, with its suburbs, heavily white.[9] Of course, the refusal to join two districts of different racial makeup is not a constitutional violation, as *Milliken* so clearly holds. Nevertheless, said the court, the statute effects a "suspect racial classification."[10] Although the statute is based on perfectly rational legislative judgments, said the trial court, they are not singly or in combination found to be "compelling."[11]

8. "In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization. Effective as well as intentional racial classifications, however, require special scrutiny under the Equal Protection Clause." App. A20.

9. "Here, the racially discriminatory exclusion of Wilmington prevented the State Board from considering whether sound educational principles dictated a consolidation of Wilmington with other school districts. But for this racial classification, the Board may have consolidated Wilmington with other New Castle County districts, with the result that the racial proportions of the districts would have been altered significantly." App. A30.

10. "Whether or not the Board would have been required to adopt a desegregation plan beyond the boundaries of Wilmington in the absence of the Educational Advancement Act, it is clear that the Act made consolidation promoting racial balance substantially less accessible than other educational strategies. Because the Educational Advancement Act, racially neutral on its face, had a significant racial impact on the policies of the State Board of Education, it constitutes a suspect classification." App. A25.

11. "Three governmental interests have been asserted as providing 'compelling' justification for the exclusion of Wilmington from school district reorganization. First, the drafters of the Educational Advancement Act believed that under the Delaware Constitution no statute could alter the boundaries of the Wilmington School District unless passed by a two-thirds majority of each house of the General Assembly. T. 1813-15, 2190-99, 2232-35, 2416. The supporters of the Act, therefore, favored exclusion of Wilmington in order to secure passage. Even assuming that the purported constitutional requirement could be a compelling interest justifying the exclusion of Wilmington, this Court can only conclude as a matter of law, no two-thirds majority requirement existed." [App. A25-26]

"A second interest advanced by the defendants is that the Wilmington city and school district boundaries have been coterminous for many years. It is undisputed that the establishment of the Wilmington city limits as the school district boundary in 1905 was racially neutral. It is also beyond question that the Wilmington School District had frequently received special legislative and administrative treatment prior to the enactment of the Educational Advancement Act. While historic community boundaries should be given substantial weight by a court reviewing legislative districting decisions, the Wilmington school district boundaries were historically permeable." [App. A27]

"In other words, the 12,000 limitation embodied a legislative judgment that if the State Board were allowed to create larger districts, the districts might well be administratively unmanageable and might lack community involvement in education." [App. A29] "In these circumstances, a decision that reorganized school districts should not have enrollments greater than 12,000 is certainly rational." [App. A30]

There is, of course, still a gap in the Court's argument that had to be filled, even if by specious reasoning. There is no evidence that in the absence of the invalid statute things would have been one bit different. Assuming, as the trial court did, that they might have been different, there remains the question of what constitutional violation was effected by the statute for which an interdistrict remedy would be appropriate.

"The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation," as the District Court quoted from *Milliken*. [App. A4] And this constitutional violation the trial court found in the fact that the statute is "suspect" because it contains an implicit racial classification, and is invalid because it precludes a racial classification.

"To the extent that 'racial characteristics' was effectively excluded from this list of legitimate educational criteria for reorganization, the exclusion of Wilmington from the Board's power under the Educational Advancement Act constitutes a suspect racial classification." [App. A24] The court went further and equated the negative and the positive of the same proposi-

tion. Failure to invoke this racial classification to change the school district boundaries is, for the trial court, the same as changing the school district boundaries to effect racial discrimination. The State "redrew" school district lines because it refused to "redraw" school district lines, district lines that had been in effect since 1905. "In short, the General Assembly 'contributed to the separation of the races by . . . redrawing school district lines.'" [App. A31] It follows, for the trial court, because the redrawing of district boundaries to effect racial discrimination is an interdistrict violation, the failure to redraw boundaries to cure racial imbalance is also an interdistrict violation. The essence of the trial court's holding is that the state failed to take affirmative action to eliminate the racial imbalance between city and suburbs. It is exactly that proposition that was rejected in *Detroit* and *Richmond*.

The fact remains that the absence of an interdistrict violation is even more patent here than in *Milliken*. The failure of the trial court so to rule is a flagrant rejection of the trial court's duty to follow the judgments of this Court however distasteful this may be to the trial court judges.

THE QUESTIONS RAISED BY THIS APPEAL ARE SUBSTANTIAL.

This is an appeal from a judgment of a three-judge district court and not a petition for certiorari. The difference is of some importance here. An appeal to this Court from a court of first instance affords a means—the only means—for correction of substantial error, as well as an opportunity for this Court to pass on a question of broad general significance in the administration of justice in the federal judicial system. This appeal qualifies on both grounds.

The central issue in this case is one that is in contest in a large number of lower federal courts. It is whether a federal court may undertake to impose an interdistrict remedy simply

because there is a concentration of black students within a city and a concentration of white students in the districts surrounding that city. Its importance is underlined not only by the number of existent cases but by the number of putative cases—the question is relevant to almost every metropolitan area in the United States. Moreover, the attempt to impose interdistrict remedies in a situation such as this "can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." [418 U. S. at 747.]

The judgment of the court below flies in the face of this Court's decision in *Milliken* v. *Bradley, supra,* and for that reason alone calls for review and reversal. It is also in conflict with decisions of several United States Courts of Appeals. Moreover, it announces a doctrine of judicial review of state legislation that is broader and less justified than any yet stated by this Court. For all these reasons the Court should accept jurisdiction of this appeal.

I. The Judgment from Which This Appeal Is Taken Is in Conflict with the Decision of This Court in Milliken v. Bradley, 418 U. S. 717 (1974), with the Decision of the Court of Appeals for the Fourth Circuit in Bradley v. School Board of the City of Richmond, Virginia, 462 F. 2d 1058 (CA 4th, 1972), aff'd by an equally divided Court, 412 U. S. 92 (1973), and with Decisions of Other Courts of Appeals.

This Court stated, at the very outset of its opinion in *Milliken,* a description of the question presented both in that case and this one:

> We granted certiorari in these consolidated cases to determine whether a federal court may impose a multidistrict, areawide remedy to a single district *de jure* segregation problem *absent any finding that the other included school districts have failed to operate unitary school systems within*

> *their districts, absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools, absent any finding that the included districts committed acts which effected segregation within the other districts,* and absent a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of the multi-district remedy or on the question of constitutional violations by those neighboring districts. [418 U. S. at 421-422.] (Emphasis added.)

Except for the fact that in both the *Richmond* case and this one the outlying school districts were afforded an opportunity to present evidence and partake in argument, all three cases—*Detroit, Richmond, Wilmington*—fit exactly into this Court's description of *Milliken*. The results in all three cases should be the same, but unless reviewed and reversed by this Court, the the court below will continue to march to a different drummer.

Attempts at meaningful differentiation of the *Wilmington* case from those in *Detroit* and *Richmond* are baseless. The substantial identity of the facts and issues are overwhelmingly established by the records.[12]

The primary factor involved in all three cases is to be found in the conclusion of all three courts, including that of the three-judge district court in *Wilmington*, that the suburban school districts, which the trial court in all three instances would have joined with the city school district, were "unitary school districts" None of the suburban districts in any of the three cases was involved in any interdistrict violation on which to predicate an interdistrict remedy.

"There is no evidence in the record which indicates that suburban schools in New Castle County are presently operating other

12. The decision below is also in conflict with the rulings of the Sixth and Seventh Circuits, which chose to follow the mandate of this Court in *Detroit* rather than flout it, as did the trial court below. See *Higgins* v. *Grand Rapids Board of Education*, 508 F. 2d 779 (CA 6th, 1974); *United States* v. *Board of School Commissioners of the City of Indianapolis, Indiana*, 503 F. 2d 68 (CA 7th, 1974), cert. den., 43 U. S. L. W. 3569, 21 April 1975.

than unitary schools for the children residing in their districts." [App. A16, n. 19] That was the conclusion of the *Wilmington* court. There had been no indication of any segregatory violation since 1965. [*Ibid.*]

In *Richmond*, the Court of Appeals pointed out:

> With the discontinuance, at the instigation of HEW, of Chesterfield County's participation in the Matoaca Laboratory School, every black child in Chesterfield County attends a racially desegregated facility, and the school system is unitary. As early as 1969, HEW was satisfied that Henrico County was operating a unitary nonracial school system, and by June 30, 1971, with the elimination of the racial identifiability of the Central Garden School, Henrico County complied in all respects with the suggestions of HEW. It is thus established that in each of the three school districts the formerly dual system of schools had been disestablished and effectively replaced with a unitary school system within which no child is excluded from any school by reason of his race. The issue, also as urged by the United States, is whether the maintenance of three separate unitary school divisions constitutes invidious racial discrimination in violation of the Fourteenth Amendment. [462 F. 2d at 1065.]

In *Wilmington*, as in *Detroit*, the suburban school systems were unitary, although the city school system was not. But the absence of a unitary system in the city affords no warrant for involving the suburban schools in a plan to desegregate the city schools. As this Court stated the rule in *Detroit:*

> To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court. [418 U. S. at 745.]

There are three congeries of facts which the trial court purportedly believed to distinguish *Wilmington* from *Detroit* and Richmond. The fact is that the three elements relied on here were present in all three cases.

A. State Statute Inhibiting Desegregation.

The trial court relied most heavily for its finding of interdistrict violation on the Educational Advancement Act. Its peculiar and improper reading of that Act will be considered below. See Point II, p. 22. Here we would show only that the existence of such a statute was held, both in *Detroit* and *Richmond*, not to constitute a violation that would serve as a basis for an interdistrict remedy.

In *Detroit*, the state law involved was not merely inferentially but directly and purposefully directed to the inhibition of desegregation, both as described by the majority and the minority in that case. The majority describes "Act 48" as having "the effect of rescinding Detroit's voluntary segregation plan." [418 U. S. 750] Mr. Justice White's opinion,

> The legislature contributed directly by enacting a statute overriding a partial high school desegregation plan voluntarily adopted by the Detroit Board of Education. [418 U. S. at 770.]

Mr. Justice Marshall, also joined by the other three dissenters, described the law:

> The State had also stood in the way of past efforts to desegregate the Detroit city schools. In 1970, for example, the Detroit School Board had begun implementation of its own desegregation plan for its high schools, despite considerable public and official resistance. The State legislature intervened by enacting Act 48 of the Public Acts of 1970. specifically prohibiting implementation of the desegregation plan and thereby continuing the growing segregation of Detroit school system. [418 U. S. at 791.]

The *Richmond* analogy is even closer, for the statute involved there was of the same variety, concerned with school district lines, as the Educational Advancement Act found constitutionally wanting by the trial court.

The statute in the *Richmond* case was described this way in the Court of Appeals opinion:

> Under the new Constitution of Virginia the State Board is given power to divide the Commonwealth into school divisions subject to "such criteria and conditions as the General Assembly may prescribe." At its extra session of 1971, the General Assembly enacted into law Virginia Code § 22-30:
>
> (1) No school division shall be composed of more than one county or city.
>
> (2) No school division shall be composed of a county or city and any one of the following towns: Abingdon, Cape Charles, Colonial Beach, Fries,, Poquoson, Saltville, or West Point.
>
> Notwithstanding any of the above criteria and conditions, the Board of Education may, upon the request of the school boards of the counties, cities, and towns affected, concurred in by the governing bodies thereof, consolidate or otherwise alter school divisions.
>
> Thus neither under the old constitution and statutes in effect prior to July 1, 1971, nor under the new constitution and statutes in effect after that date, could the State Board of Education, acting alone, have effected the consolidation of the school systems of Richmond, Henrico and Chesterfield into a single system under the control of a single school board. [462 F. 2d at 1067.]

In Virginia, as in Delaware, the statute precluded interference with long-established city school district boundaries. In both, the statute was of recent origin. In neither, could it be realistically treated as "redrawing" school boundaries with segregatory effect. The trial court's attempt to distinguish the precedent of the Fourth Circuit in the *Richmond* case proves unmeritorious.

The fact is that if the statute were unconstitutional, its invalidity would only leave the State Board free to violate the boundaries of the Wilmington School District. It would not compel the State Board to violate those boundaries. Nor would its invalidity authorize the court to compel the violation of these boundaries. It is that very absence of that judicial power that was established in *Milliken*.

B. Housing.

The trial court found that there was housing segregation within the City and County from which it assumed, without proof, that school segregation followed. The role of local and state government in bringing about this housing segregation was, however, purely speculative and, in any event, far less than that involved in the other two cases, where it was held not to warrant an interdistrict remedy.

The trial court found that there had been continued registration of some deeds with illegal restrictive covenants which covenants are, of course, as ineffective in Delaware as anywhere else. It found that there had been little or no public housing in the suburban areas but some in the city. It discovered that the State had distributed copies of the Code of Ethics of the National Association of Real Estate Boards, which admonished against breaking up neighborhoods by introducing wealth or race or religious diversity where they didn't already exist. There was also evidence that the F. H. A., a federal agency, had, in the past, not utilized its mortgage funds to aid black movement to the suburbs.

Not surprisingly, the same evidence was introduced in each of the three cases; counsel for plaintiffs in all three cases were the same and the pattern of complaint and proof in all three cases was the same.

In *Richmond*, however, the findings of the trial court about such housing discrepancies were extensive. See 338 F. Supp. at 212-29. Nevertheless, the Fourth Circuit, sitting en banc, rejected the proposition that such alleged violations showed the confinement of blacks by the state or its agencies within the city limits:

> We agree that there has been some inaction, *(e.g.*, nonparticipation in construction of low income housing) by the counties here which may have restricted the access of blacks to residences in these counties. If we assume invidious purpose, and none is established, it is possible to draw an inference of cause and effect if one ignores the possibility that in a heavily white county much of such housing would likely be occupied by low income whites. Former FHA policies and the use of racially restrictive covenants have doubtless had an impact on residential housing patterns within the city and the counties. The record does not establish whether or not Richmond's restrictive use of such tools of discrimination has been greater or less than that of the counties. We are thus unable to determine whether such discrimination, practiced in all three units, has had any impact upon movement by blacks out of the city and into the counties.
>
> The two instances in the record of private discrimination in the sale of housing, illegal since *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968), are scant evidence of state action, even assuming that state *inaction* in preventing such discrimination is state action within the meaning of *Shelley* v. *Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). [462 F. 2d at 1066.]

So, too, in *Detroit*, the trial court relied on similar proof to reach the conclusion that was reached here.

> Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area. It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community —as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of "harmonious" neighborhoods, *i.e.*, racially and economically harmonious. The conditions created continue. While it would be unfair

> to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools. [338 F. Supp. at 587.]

Even the Sixth Circuit declined to rely on the testimony relating to housing and, so, the Supreme Court did not include it within the list of issues on which it had to pass, 418 U. S. at 728 n. 7, although under the reading of *Milliken* by the trial court here, it would necessarily have been a relevant issue. Mr. Justice Stewart would have considered an interdistrict remedy on a showing of "purposeful, racially discriminatory use of state housing or zoning laws," 418 U. S. at 755, but he did not regard the record in *Detroit* as such a "factual situation". He said, rather, that a record which was stronger than this one was inadequate:

> No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity. [418 U. S. at 756, n. 2.]

This Court has made it clear, too, that local option on the construction of low-cost housing is not a violation of the Constitution. See *James* v. *Valtierra*, 402 U. S. 137 (1971); *Citizens Comm. for Faraday Wood* v. *Lindsay*, 507 F. 2d 1065 (CA 2d, 1974), *cert. den.* 43 U. S. L. W. 3854, 28 April, 1975.

C. Interdistrict Transportation, Optional Attendance Zones, Etc.

The trial court, in an effort to create "interdistrict violations" on which to order an interdistrict remedy, made reference to certain acts on the basis of which it would claim to create a remedy even though the remedy was not directed to a cure of those actions.

Thus, it found that an intradistrict "optional attendance" plan, framed to protect the desegregation that had taken place in Wilmington, resulted, instead, in "white flight" which it would consider an interdistrict violation. [App. A12-13] There was, however, certainly no participation in this "violation" by the suburban school districts. And, as this Court said in *Detroit:*

> Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of surrounding districts. [418 U. S. at 749.]

The fact is, once again, that in *Detroit*, the trial court had based relief on similar "optional attendance zones," only more of them. See 338 F. Supp. at 587. That judgment was reversed by this Court.

The trial court here would also predicate relief on the fact that the state subsidized transportation to private and parochial schools, most of whose students were white. And again the analogy to *Detroit* becomes patent. For in *Detroit*, the plaintiffs had shown the use of transportation, not merely to aid private school students, which is not a constitutional violation, but rather to effectuate segregation and, in at least one instance, to effectuate segregation by way of a cross-district violation.

The trial court in *Detroit* summed up the transportation policy this way:

> The Board in the operation of its transportation to relieve overcrowding policy, has admitted it bused black pupils past or away from closer white schools. This practice has

> continued in several instances in recent years despite the Board's avowed policy, adopted in 1967, to utilize transportation to increase integration." [338 F. Supp. at 588.]

And the Court of Appeals for the Sixth Circuit found:

> . . . that the "State statutory scheme of support of transportation for school children directly discriminated against Detroit" [*id.*, at 240] by not providing transportation funds to Detroit on the same basis as funds were provided to suburban districts [*id.*, at 238] . . ." [418 U. S. at 735.]

And, as this Court noted in *Detroit:*

> The Court of Appeals found record evidence that in at least one instance during the period 1957-58, Detroit served a suburban school district by contracting with it to educate its Negro high school students by transporting them away from nearby suburban white high schools, and past Detroit high schools which were predominantly white, to all or predominantly Negro Detroit schools. 484 F. 2d at 231. [418 U. S. at 725, n. 4]

Certainly, if the transportation policies in the *Detroit* case did not warrant an interdistrict remedy, the same denial of relief is dictated in *Wilmington, a fortiori.* And the same conclusion is compelled by comparison with the transportation policies attacked in the *Richmond* case. See 338 F. Supp. at 158-65.

There is no difference on which a court could properly distinguish *Detroit* and *Richmond* from the instant case.

II. In Holding the Delaware Educational Advancement Act Invalid, the Trial Court Ignored Some and Perverted Other Decisions by This Court on the Doctrine of "Suspect Classification."

The failure of the District Court to abide by the rulings of this Court in *Milliken,* which has already been described, is perhaps the lesser of its doctrinal errors in this case. The restructuring of this Court's doctrine of "suspect classifications,"

if permitted to stand, would result in a presumption of invalidity of most, if not all, state legislation, for it would strike down the presumption of legislative legitimacy in an extraordinarily wide area and make the federal courts the censors of state legislation by requiring the state to justify—on ground of legislative judgment—all legislation attacked as unconstitutional. The doctrine as stated by the court below would substitute federal district judges for the elected representatives of the people. Nor, given the trial court's reasoning, would Congressional legislation be immune from similar treatment.

The trial court reached its conclusion of unconstitutionality of the Delaware statute by what can only be called a parody of reasoning. There is no question that the trial court found that the legislative motive and intent was free of the taint of racial discrimination. The statute itself contains no racial classifications. The statute announces classifications in terms of historic school boundaries and local control of schools that have been confirmed by this Court and Congress as perfectly constitutional. See *Milliken* v. *Bradley, supra; Bradley* v. *School Board of the City of Richmond, supra; Spencer* v. *Kugler,* 404 U. S. 1027 (1972). See, also, 20 U. S. C. §§ 1415, 1404, 1405. The trial court found the statute "suspect" not because it utilized suspect racial classifications but because it limited the discretion of educational administrative agencies that might otherwise have used suspect racial classifications. It thus put the burden on the state to come up with compelling reasons to justify its legislative judgment and found those reasons inadequate.

In reaching its conclusion, the trial court necessarily rejected the opinions and judgments of this Court in, *inter alia, Jefferson* v. *Hackney,* 406 U. S. 535, 537-38 (1972); *James* v. *Valtierra,* 402 U. S. 137 (1971); *Palmer* v. *Thompson,* 403 U. S. 217 (1971); and *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1 (1973). There must be either a racial classification or a law that inhibits a constitutional right before the "suspect classification" rationale can be invoked to

create a presumption against legislative validity. There was here neither a racial classification nor an infringement on any constitutional right. As *Milliken* held, there is no constitutional right to change school district boundaries simply because one district is heavily black and the others heavily white. See also *Bradley* v. *School Board of the City of Richmond, supra; Spencer* v. *Kugler, supra; Higgins* v. *Grand Rapids Board of Education, supra; United States* v. *Board of Commissioners of the City of Indianapolis, Indiana, supra.* And the mere assertion of such a constitutional right is not sufficient to create the presumption of invalidity indulged by the trial court below. See *Fuller* v. *Oregon,* 417 U. S. 40 (1974); *Village of Belle Terre* v. *Boraas,* 416 U. S. 1 (1974); *Kahn* v. *Shevin,* 416 U. S. 351 (1974); *Johnson* v. *Robison,* 415 U. S. 361 (1974). Under these circumstances, not even a federal district court is free to substitute its judgment for that of the state legislature.

The basic importance of this question raised by the decision of the court below to our constitutional structure should be hard to gainsay.

CONCLUSION.

The essential question presented by this appeal is whether a lower federal court is obliged to follow the decisions of this Court. The instant case is on all fours with that of *Milliken* v. *Bradley*, decided by this Court last June. If stare decisis is to have any meaning, the two cases must be decided alike. Either the decision below must be reversed or *Milliken* v. *Bradley* must be overruled. This Court should, therefore, either summarily reverse the judgment below on the authority of *Milliken* or take jurisdiction of this case to consider whether *Milliken* should be overruled.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT,
For the District of Delaware.

BRENDA EVANS, ET AL.,
Plaintiffs,

vs.

MADELINE BUCHANAN, ET AL.,
Defendants.

Civil Action
Nos. 1816-1822.

Louis L. Redding, Esquire, Wilmington, Delaware; Irving Morris, Esquire and Joseph A. Rosenthal, Esquire, of Morris and Rosenthal, Wilmington, Delaware, Attorneys for individual plaintiffs.

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Before GIBBONS, *Circuit Judge*, WRIGHT, *Senior District Judge*, and LAYTON, *Senior District Judge*.

OPINION.

Wilmington, Delaware.

WRIGHT, J.

The issue before the Court is whether, in light of the Supreme Court's opinion in Milliken v. Bradley, 42 L. W. 5249 (July 25, 1974), it is incumbent upon us to consider metropolitan as well as Wilmington-only school desegregation remedies. Based on the findings we make today, we conclude that the record in this case makes it necessary to consider inter-district school desegregation remedies. Accordingly, the parties will be required to submit alternative Wilmington only and inter-district plans to eliminate existing school segregation in New Castle County.

I.

This lawsuit began in 1957. Its object was to eliminate the *de jure* segregation in Delaware schools. The history of the case is set forth in detail in our most recent opinion, Evans v. Buchanan, 379 F. Supp. 1218 (D. Del. 1974). In that opinion, filed on July 12, 1974, we found unanimously that many schools in Wilmington which were black schools prior to Brown v. Board of Education, 347 U. S. 483 (1954) (*Brown I*) remained identifiably black until 1974, and that the dual school system in Wilmington had not been eliminated. We also re-affirmed repeated holdings by this Court and the Court of Appeals that the duty to desegregate Delaware schools rests primarily with the State Board of Education. 379 F. Supp. at 1221-22. The majority of the Court postponed consideration (a) of plaintiffs' challenge to the constitutionality of the Educational Advancement Act of 1968, 14 Del. C. § 1001 *et seq.* and (b) of plaintiffs' claim that state enforcement and authorization of private racial discrimination, particularly in housing, resulted in racially segregated schools in New Castle County. Our brother Gibbons,

would have found, on the authority of Wright v. Council of the City of Emporia, 407 U. S. 451 (1972), and United States v. Scotland Neck City Board of Education, 407 U. S. 484 (1972), that the provisions of the Educational Advancement Act excluding the Wilmington School District from a general reorganization of Delaware school districts were unconstitutional.

The majority of the Court could not, without making further findings, determine whether or not a remedy confined to the Wilmington School District would satisfy existing constitutional requirements. Therefore, the parties were required to submit, by September 15, 1974, alternative desegregation plans (a) within the present boundaries of the Wilmington School District and (b) incorporating other areas of New Castle County, 379 F. Supp. at 1224.

Before the date for submission of desegregation plans, the Supreme Court issued its *Milliken* opinion. That decision raised issues which led us to postpone the submission of desegregation plans. Both Chief Justice Burger's opinion for the Court and Justice Stewart's concurring opinion commented upon the limited opportunity afforded to suburban Detroit school districts to present evidence in *Milliken*. 42 L. W. at 5253-54, 5260. We therefore deemed it appropriate to afford suburban New Castle County school districts an opportunity to intervene in this proceeding pursuant to Rule 24, Federal Rules of Civil Procedure, and to present evidence on issues raised by the amended complaint. Appropriate notice was given to all districts which might be affected by a decree, and virtually all suburban school districts intervened.[1] All of the intervening districts elected to adopt the State Board's pleadings and to stand on the evidence already of record in this proceeding. A brief schedule was estab-

1. The intervening districts are: Alexis I. DuPont, Alfred I. DuPont, Appoquinimink, Claymont, Conrad, DeLaWarr, Marshallton-McKean, Mount Pleasant, New Castle-Gunning Bedford, Newark and Stanton. Only the New Castle County Vocational-Technical District did not choose to intervene. That district presently accepts students from throughout New Castle County.

lished among all parties for argument on the impact of the *Milliken* opinion on the scope of this Court's remedial authority. Briefing was completed and oral argument held on January 15, 1975.

II.

In Milliken v. Bradley, the Supreme Court framed an equitable limitation on the appropriate remedies for *de jure* school segregation. The essence of the holding in *Miliken* is found in three sentences:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. Swann [v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971)], at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional volation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. 42 L. W. at 5258.

The Supreme Court found that in Detroit, acts of *de jure* segregation were, with one exception held to be *de minimis*,[2] confined to the limits of the Detroit School District. Even though

2. In the late 1950's, the Carver School District, a black suburban district, arranged to have its black high school students sent to a predominantly black high school in Detroit, rather than to geographically closer white suburban or city schools. 43 L. W. at 5259. Cf., Bradley v. Milliken, 484 F.2d 215, 231 (6th Cir. 1973). Even though this practice terminated in 1960 when the Carver District was annexed by a predominantly white suburban district, the Supreme Court stated, ". . . it appears that this situation, whether with or without the State's consent, may have had a segregatory effect on the school populations of the two districts involved." 42 L. W. at 5259. However, the Supreme Court found that this "isolated instance" of inter-district segregation did not justify a remedy of the scope contemplated by the lower courts. *Ibid.*

the State of Michigan, as well as the Detroit school authorities, was responsible for this *de jure* segregation, a cross-district remedy was found to be improper, in light of the fact that historically Michigan school districts were meaningfully separate and autonomous, that the district boundaries were not established for the purpose of creating, maintaining, or perpetuating segregation of races, and that unitary school systems have long been required by Michigan law.

We do not read the *Milliken* decision as restricting the reach of the fourteenth amendment. It is true that Chief Justice Burger writes at one point:

> Where the schools of one district have been affected, there is no *constitutional* power in the courts to decree relief balancing the racial composition of that district's schools with those of surrounding districts. 42 L. W. at 5259. [Emphasis added].

An expansive interpretation of this language would suggest an immunity from constitutional scrutiny, by the federal courts or Congress, for state decisions concerning political or administrative subdivisions. Other language in the opinion however, demonstrates that such an interpretation of the quoted language is improper. The opinion states:

> Of course, no state law is above the Constitution. School district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies. 42 L. W. at 5257.[3]

Both the factual context and the language of the majority opinion indicate that it is concerned with the appropriate exercise of federal equity jurisdiction, not the questions of substantive constitutional law. See generally, The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 59-69 (1974). Such was clearly

3. The majority opinion also states, "Boundary lines may be bridged where there has been a constitutional violation calling for inter-district relief. . . ." 42 L. W. at 5257.

the understanding of Justice Stewart, 42 L. W. at 5260, and such has been the consistent interpretation of lower court decisions following *Milliken*. See, e.g., Newburg Area Council, Inc. v. Board of Education of Jefferson County, Kentucky, Nos. 73-1403, 73-1408 (6th Cir., December 11, 1974); Gautreaux v. Chicago Housing Authority, 503 F. 2d 68 (7th Cir. 1974); United States v. State of Missouri, No. 71 C 555 (1) (E. D. Mo. January 9, 1975).

Michigan, unlike Delaware, never required segregation by race in its schools. We conclude, however, that the remedial standards adopted by *Milliken* are equally applicable to formerly *de jure* states. Nothing in the Supreme Court's opinion suggests that it does not govern desegregation decrees in states which formerly required segregation by law. Compare, Newburg Area Council, Inc. v. Board of Education of Jefferson County, Kentucky, *supra*. Of course, to the extent that segregation imposed by state law has had inter-district effects, federal courts can fashion appropriate inter-district remedies. In short, this Court, in light of the *Milliken* holding, is authorized to consider desegregation relief embracing more than the Wilmington district only upon findings either that school districts in New Castle County are not meaningfully separate and autonomous, or that there have been racially discriminatory acts of the state or of local school districts causing inter-district segregation. Because our opinion of July 12, 1974, made no findings concerning inter-district constitutional violations, we must now make additional findings on these issues.

III.

New Castle County, the most popular of Delaware's three counties, occupies 435 square miles in area and has a population, according to the 1970 census, of approximately 386,000.[4] The City of Wilmington occupies approximately 15 square miles

4. In 1970, the population of Delaware was approximately 548,000.

and is located roughly at the center of that portion of New Castle County which lies north of the Chesapeake and Delaware Canal. In 1970, Wilmington's population was approximately 80,000. According to the 1970 census. 12.7% of New Castle County residents are black, and while 43.6% of Wilmington residents are black, only 4.5% of suburban New Castle County residents are black. During the past two decades, New Castle County has experienced rapid demographic change, consisting of substantial growth in the population of the suburbs and white flight from the City of Wilmington. In 1950, the City of Wilmington had a population of about 110,000, of whom 15% were black. At the time, suburban New Castle County had a population of about 62,000, of whom 6.4% were black. Since 1950, in other words, the suburban population has increased fivefold and the percentage of black residents living in the suburbs has declined slightly. Wilmington's population, on the other hand, decreased in absolute terms, and its proportionate black population tripled. The result of these demographic changes is that the black population of the County is heavily concentrated within the City of Wilmington.[5]

The residential demographic change of the past two decades has had a striking effect on the school attendance patterns in the County. Of the 21,543 children attending suburban New Castle County schools in 1954, only 845, or approximately 4% were black. Wilmington school enrollment in 1954 was 12,875, of whom 3,572, or approximately 28% were black. PX 134(e). By 1964, suburban New Castle County schools enrolled 52,723 students, of whom 3,325, or about 6% were black, DX 129, while Wilmington enrollment was 15,527, of whom 8,868 students, or 57% were black. PX 6. In 1973, suburban enrollment was 73,008, including 4,359, or 6% black children. In that year, Wilmington enrollment was 14,688, which included 12,141, or approximately 83% black students. PX 5. In sum, during this period of rapid expansion of suburban school enroll-

5. See generally, PX 1-4, 18; Pre-trial Order.

ment, the proportion of black children attending suburban New Castle County schools remained relatively small. Total enrollment in Wilmington, on the other hand, grew more slowly and eventually declined, but the proportion of black children in the school population increased threefold.

Many of the school districts in New Castle County have historic antecedents.[6] However, during the period before *Brown I*, there was substantial interdependence of the Wilmington and suburban school systems. For many years, the only high school in the County that accepted black students was Howard High School in Wilmington. Many black students traveled across district lines to attend Howard. Moreover, black elementary and junior high school students from suburban areas often attended Wilmington "colored" schools rather than the "colored" schools nearer their homes. In the 1954-55 school year, Howard High School received 101 black high school students, Bancroft Junior High School received 46 black junior high school students, and Elbert, Stubbs, and No. 20 Elementary Schools received 44 black elementary students from suburban New Castle County districts.[7] PX 157. Although 845 black children attended suburban "colored" schools that year, the number of black children crossing district lines into Wilmington indicates that to a significant extent, black schools in Wilmington under the *de jure* system were schools for black children from throughout New Castle County. Sometime after *Brown I*, this inter-district transfer program ceased, and black children attended school in the suburban districts where they resided. As we found in our recent opinion, however, Howard, Bancroft, Elbert and Stubbs remain identifiably black schools today.

6. Many of the suburban districts originated, in whole or in part, in the late 19th or early 20th century. However, almost every present suburban school district has been involved in district consolidation or sharing of facilities with neighboring districts. T. 2108-11, 2485-2503.

7. According to PX 157, these black children resided in the following districts: Alexis I. DuPont, Conrad, Delaware City, Hockessin, Millside, Newark, and New Castle.

At the same time that suburban black children attended Wilmington's "colored" schools, suburban white children crossed district lines to attend "white" schools in Wilmington, either because their home districts lacked a full twelve-grade program or because Wilmington schools were considered educationally superior. In the 1954-55 school year, 910 white non-resident students attended Wilmington schools. These students came from virtually all suburban districts, and in particular, substantial numbers of students came from the Alexis I. DuPont, Alfred I. DuPont, Claymont, Conrad, Mount Pleasant, and New Castle Districts. PX 157. As the suburban districts built new schools and expanded existing facilities to accommodate increasing student populations in the year following *Brown I*, suburban white children were no longer sent to Wilmington schools and attended schools in their suburban districts.[8]

Nearly all of the Wilmington schools which were segregated white schools before *Brown I* have since become predominantly black schools.[9] The growth of identifiably black schools mirrored population shifts in New Castle County. To a significant extent

8. See T. 1114-17; PX 95. Evidently, suburban children continued to attend Brown Vocational School in Wilmington until the late 1960's, when the New Castle County Vocational-Technical School opened and began accepting students from throughout the County. PX 6; T. 2526-34.

The "withdrawal" of suburban children, both black and white, from the Wilmington School District may have altered the racial balance of school attendance in Wilmington somewhat. Not including Brown Vocational School students, 916 (black and white) students from suburban New Castle County, approximately 21% of whom were black, attended (*de jure*) Wilmington schools in the 1954-55 school year. PX 157. Assuming these children were "withdrawn" from Wilmington during the 1950's, when the Wilmington schools ranged from 28% (1954) to 45% (1960) black, the withdrawal reduced, to an extent, the proportionate white enrollment. We do not find this "withdrawal" of students to be significant inter-district segregation under *Milliken*.

9. The Highlands Elementary School is the only pre-*Brown* white school still having a predominantly white enrollment. Cedar Hill School, which opened in 1959, is the only other public school in Wilmington with a majority white enrollment. PX 6.

these demographic changes, i.e., the net outmigration of white population and increase of city black population in the last two decades, resulted not exclusively from individual residential choice and economics, but also from assistance, encouragement, and authorization by governmental policies. Here, as elsewhere, the 1936 Federal Housing Administration mortgage underwriting manual, which continued in use until 1949, advocated racially and economically homogeneous neighborhoods.[10] Prior to passage of federal and state open housing legislation in 1968, Fair Housing Act of 1968, 42 U. S. C. § 3601 *et seq.;* Equal Rights to Housing Act, 6 Del. C. § 4601 *et seq.*, racial discrimination in the sale or rental of private housing in New Castle County was widespread, was tolerated or encouraged by the real estate industry, and was sanctioned by state officials. Racially restrictive covenants, held to violate the fourteenth amendment in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), continued to be recorded in New Castle County real estate deeds until 1973. PX 206. The Delaware Real Estate Commission, a state licensing agency, published *The Real Estate License Act and Primer* which reprinted the Code of Ethics of the National Association of Real Estate Boards. That Code of Ethics read in part:

> A realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood. PX 142.

10. PX 176. President Nixon, in a message to Congress of June 29, 1971, recognized the continuing effect of federal policies sanctioning residential segregation:

> Residential separation of racial minorities was and is, another characteristic of the social environment which has been influenced by federal housing policy. Until 1949, FHA officially sanctioned and perpetuated community patterns of residential separation based on race by refusing to insure mortgages in neighborhood[s] not racially homogeneous. The effects of this policy have persisted for many years after its reversal and are still evident in metropolitan areas today. H. R. No. 92-136 (June 29, 1971).

See also, Bradley v. Milliken, 42 L. W. at 5252, n. 7; Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143, 182 (W. D. Mich. 1973).

This language making racial discrimination a matter of realtor ethics was not eliminated in the state publication until 1970.[11] The pervasiveness of housing discrimination in the New Castle County real estate industry is demonstrated by the Multi-List established by the Greater Wilmington Board of Realtors in April, 1965. The Multi-List designated as "open" those listings where the owner was willing to sell to a minority buyer. A study of the Multi-List during the period 1965-67 prepared by the State Human Relations Commission indicated that 51% of all new listings in the City of Wilmington were "open", but only 7% of new listings in the suburbs were "open". PX 179.

Public housing policies also contributed to the concentration of minority residents in Wilmington. Until 1972, the Wilmington Housing Authority had jurisdiction to establish publicly-assisted housing units up to five miles beyond the city limits. Nevertheless, while the Wilmington Housing Authority operates over 2,000 public housing units within the City of Wilmington, fewer than 40 units were established in the suburbs. The New Castle County Housing Authority, which was created in January 1972, failed, until the time of trial, to build any housing units in the suburbs and operated a minimal number of pre-existing units located on the property of the Greater Wilmington Airport. The several attempts by the County Housing Authority to fund public housing developments at suburban sites have met vigorous opposition from neighborhood groups and have been unsuccessful in gaining the necessary rezoning or site approval from the New Castle County Council.[12] Undoubtedly, there are many legitimate objections to public housing developments, but the fact remains that during a period of extraordinary population growth in New Castle County, virtually the only

11. T. 509-12, 543-44, 2437.

12. T. 860-936; PX 173.

public housing units constructed were located in the City of Wilmington. The evident effect was to concentrate poor and minority families in Wilmington.[13]

Moreover, certain policies of the Wilmington School Board, although possibly designed to minimize the flight of white families with school-aged children to the suburbs, may have had the opposite effect. The record indicates that optional attendance zones established by the Wilmington School Board after 1954 in several instances allowed white students to attend schools in attendance areas other than those in which they resided.[14] One result of these optional attendance zones was to create a proportionately larger black school population in the transferor schools. The presence of proportionately more

13. The cities of Newark and Middletown also operate public housing programs. Presumably these are small programs, but the record does not indicate the number of units and racial composition of residents in these two programs. The record is also silent as to the racial population of present residents of publicly-assisted housing in Wilmington and the suburbs. According to the 1970 census, however, the proportion of all families with incomes below the poverty level is approximately three times greater for blacks than whites in Wilmington and approximately five times greater for blacks than whites in suburban New Castle County. PX 18, Tables P-4, P-6. Thus, it is unlikely that if publicly-assisted housing were built in the suburbs, the units would be occupied primarily by low-income whites. Compare Bradley v. School Board of City of Richmond, Virginia, 462 F. 2d 1058, 1066 (4th Cir. 1972).

14. Examples of such optional attendance zones, according to Dr. Gordon Foster, plaintiffs' expert witness, were the Cedar Hill-Lore and Highlands-Lore options for elementary schools, the Warner-Bancroft and Bayard-Bancroft options for junior high schools, and the Howard-P. S. DuPont options for high schools. T. 1358-1428. The drawing of the attendance zone for the Cedar Hill Elementary School, built in 1959 to replace the old No. 19 School which had a predominantly white enrollment, also had a segregative effect. The Cedar Hill boundaries were extended several blocks north of the No. 19 attendance area to include an all-white residential area formerly belonging to the Williams School attendance area. The Cedar Hill School opened with a 3.3% black enrollment in 1959. The neighboring Williams School, which in 1958 had a 48% black enrollment, had a 63% black enrollment after the boundary line change. T. 1370-75.

black children in a school than in the neighborhood served by the school may have encouraged white families to move out and discouraged white families from moving in.[15] To some extent then, discriminatory school policies in Wilmington may have affected the relative racial balance in housing and schools in Wilmington and the suburbs.

Finally, in the past few years, the State has subsidized interdistrict transportation of students to private and parochial schools. In 1968, the General Assembly passed legislation authorizing a subsidy, to be administered by the State Board of

15. A study of Wilmington's Ninth Ward by the State Human Relations Commission discussed the problem of disproportionate black enrollment in a neighborhood's schools as follows:

> In surveys of those selling their homes in the 9th Ward, school problems were mentioned as reasons for leaving—both by those with children, and even by those with no remaining direct contact with the schools.
>
> Specific complaints were "fights with black children", "fear of rape", concern for "safety of the children".
>
> There is no point in arguing that such fears may not be fully rational. The fears are real, even if the threats may not be. And two factors have existed to trigger action on the basis of such fear.
>
> The first factor is a pattern of increasingly large black enrollments in 9th-Ward schools since 1960. In that year, when only 17 black residents were tallied in the entire 9th Ward, P. S. DuPont enrolled 10% black students among its total of 1,500. Four years later, the white enrollment had fallen by 200, while non-white increased 200, for a non-white percentage of 25%. In 1967, against a population in the neighborhood of 15%, P. S.—still with 1,500 students—counted 41% non-white.
>
> Junior high figures parallel these closely; integration started later at the elementary level in the 9th Ward but also produced school enrollments in the 30-45% range by 1967.
>
> The increasing numbers of black students generated white parental fears. But to produce action a second factor was necessary: the existence near-at-hand of systems in which black students were barely present. The Wilmington suburbs—particularly those in the northern sector of the County—provided just such an "escape".
>
> To the extent that these disparate systems function side-by-side, the 9th Ward will continue to be shunned by white parents who for many other reasons would find it a desirable area in which to live. PX 180.

Education, for transportation of pupils enrolled in "nonpublic, nonprofit" elementary and secondary schools. 14 Del. C. § 2905. Although the statute expressly provided that the subsidy would only be available for transportation "within the described boundaries of a public school district and not beyond those boundaries", § 2905(c), the Board of Education thereafter adopted regulations providing a transportation subsidy for private school pupils traveling across public school district boundaries. On March 9, 1973, the Attorney General issued an opinion condemning the interdistrict transportation subsidy as a violation of the statute. Thereafter, the General Assembly passed legislation expressly reinstating the subsidy for inter-district transportation of private and parochial students. For the 1973-74 school year, parents of private and parochial students received up to $86 per pupil for such inter-district transportation.[16] The present total expenditure for non-public school student transportation is presently 7-800,000 dollars per year. Before the inter-district subsidy was allowed, the cost was approximately half that amount. By contrast, the total expenditure for public school transportation in Delaware is approximately seven million dollars per year.[17] Since approximately 94% of all private and parochial students are white. the effect of the inter-district subsidy in New Castle County, where 16,535 students attended these schools at the time of trial, is frequently to assist white children residing in Wilmington to attend non-public schools in the suburbs and vice versa.[18] To the extent that the subsidy has had an effect on public school enrollment, it has undoubtedly served to augment the racial disparity between Wilmington and suburban public school populations.

As the Supreme Court noted in *Swann*, "People gravitate toward school facilities, just as schools are located in response

16. Pre-trial Order Stipulations 33-36.
17. T. 2561-62.
18. DX 77; T. 2666.

to the needs of people. The location of schools may thus influence the patterns of residential development of metropolitan area and have important impact on composition of inner-city neighborhoods". 402 U. S. at 20-21. The record in this case is replete with evidence that racial balance in housing is integrally related to racial balance in the public schools. Several realtors testified that sales in the housing market are tied to the characteristics of the schools in the neighborhood: "The first thing you teach yourself is know your school district because you sell houses in New Castle County based on school districts". T. 476. See also, T. 486, 514, 2465. Dr. Karl Taeuber, a demographer, testified similarly that the specific school district is part of the identification of neighborhoods that the general public and the real estate industry use to characterize housing. T. 635-45.

The majority opinion in *Milliken* cited with approval Haney v. County Board of Education of Sevier County, 429 F. 2d 364 (8th Cir. 1969), and United States v. Texas, 321 F. Supp. 1043 (E. D. Tex. 1970), aff'd 447 F. 2d 441 (5th Cir. 1971), cert. denied, sub. nom. Edgar v. United States, 404 U. S. 1016 (1972). In both cases, uniracial school districts established during the period of *de jure* segregation and maintained as such thereafter were consolidated by court decree for purposes of desegregation. See also, Haney v. County Board, 410 F. 2d 920 (8th Cir. 1969). The teaching of these cases is that one-race neighboring or overlapping districts, maintained as such after the demise of statutory school segregation, require desegregation. In New Castle County before *Brown*, the black high school and, to a significant extent, the black elementary schools in Wilmington served black children from the entire County. Unlike the situations in Detroit, where the suburban districts had never been implicated in *de jure* segregation, *Milliken* v. *Bradley*, 42 L. W. at 5258, and in Richmond, where suburban districts had participated in *de jure* segregation, but independently from the city school system, Bradley v. School

Board of City of Richmond, Virginia, 462 F. 2d at 1064-65, *de jure* segregation in New Castle County was a cooperative venture involving both city and suburbs. Although the Wilmington School District was predominantly white at that time, a desegregation decree could properly have considered city and suburbs together for purposes of remedy. At that time, in other words, Wilmington and suburban districts were not meaningfully "separate and autonomous". See also, Wright v. Council of the City of Emporia, *supra*, and United States v. Scotland Neck, *supra*.

Since the 1950's, however, Wilmington and suburban schools have, to a great extent, operated independently of one another. The suburban districts have, for the past several years, operated unitary schools for the children residing within their districts.[19] Nevertheless, because since *Brown* governmental authorities have contributed to the racial isolation of city from suburbs, the racial characteristics of city and suburban schools are still interrelated. The "core" black schools in Wilmington, as we held in our recent opinion, have remained segregated black schools continuously to this day, and most of the Wilmington schools have also become identifiably black. By the variety of federal, state and local conduct detailed above, governmental authorities have elected to place their "power, property, and prestige" behind the white exodus from Wilmington and the widespread housing discrimination patterns in New Castle

19. There is no evidence in the record which indicates that suburban schools in New Castle County are presently operating other than unitary schools for the children residing in their districts. See generally, PX 134. In many suburban districts, true desegregation came only after this Court's 1961 decree. In 1962, this Court found racial gerrymandering had occurred in the De La Warr School District. Evans v. Buchanan, 207 F. Supp. 820. In 1965, the De La Warr District was required to undertake desegregation measures by the Department of Health, Education and Welfare pursuant to Title VI of the Civil Rights Act of 1964. In 1965, Iron Hill No. 112 and Middletown No. 120, segregated black schools located in the Newark and Appoquinimink Districts, respectively, were phased out by the State Board of Education. PX 23K; DX 55.

County. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961). Governmental authorities condoned and encouraged discrimination in the private housing market and provided public housing almost exclusively within the confines of Wilmington. The specific effect of these policies was to restrict the availability of private and public housing to blacks in suburban New Castle County at a time when housing became increasingly available to them in Wilmington.[20] Realizing that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task'," *id.* at 722, we nevertheless conclude that governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades.

This conduct constitutes segregative action with inter-district effects under *Milliken*, 42 L. W. at 5261. (Stewart, J., concurring).

IV.

A central issue in this case has been whether, in addition to the foregoing conduct, the Education Advancement Act of 1968 has constituted impermissible inter-district segregation. The Educational Advancement Act was passed by the General Assembly "to provide the framework for an effective and orderly reorganization of the existing school districts of this State. . . ." 14 Del. C. § 1001. Pursuant to the Act, all school districts in Delaware, including the Wilmington School District, became

20. In *Swann*, the Supreme Court noted in a related context:

> The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems. This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, sometimes neutralizing or negating remedial action before it was fully implemented. 402 U. S. at 14 [footnote omitted].

"reorganized school districts". 14 Del. C. § 1005. The key reorganization provisions of the Act provided an exemption of approximately one year from the long-standing requirement in Delaware law that consolidation of contiguous school districts must be approved by a referendum in each of the districts affected. 14 Del. C. §§ 1001-05. In other words, for a limited time, the State Board of Education was authorized to consolidate school districts according to the dictates of sound educational administration and certain statutory criteria. The Wilmington School District was explicitly excluded from the reorganization powers of the State Board by § 1004(c)(4): "The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits." Wilmington was also excluded implicitly from any consolidation plan by § 1004(c)(2), which limited the maximum pupil enrollment in any proposed school district to 12,000.[21]

At the time of the enactment of the Educational Advancement Act, the state public school enrollment was 115,579, comprised of 81% white children and 19% black children. New Castle County, including Wilmington, had an enrollment of 76,223, of whom 83% were white and 17% were black. Wilmington had an enrollment of 15,026, of whom 34% were white and 66% were black. Wilmington was the only school district in New Castle County with a majority black enrollment, and 75% of all black pupils in New Castle County attended school in Wilmington.[22] The only other school district in New Castle County with a proportionately large black enrollment was the De La Warr District, where black pupils comprised

21. The Newark School District in suburban New Castle County had an enrollment of approximately 12,000 and was the only other district in Delaware affected by the 12,000 maximum. The Newark enrollment was 97% white, 3% black.

22. Two small districts in Sussex County, Ellendale and Lincoln, with 252 and 233 students, respectively, also had majority black enrollments at this time.

35% of the total enrollment of 4,354. Fully 44% of all black public school pupils in Delaware attended Wilmington schools.[23]

We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory. To be sure, all legislators in Delaware in 1968 knew that Wilmington had a large black population, and most legislators may have known that the Wilmington School District was predominantly black.[24] On the other hand, the focus of the legislature's concern in developing the consolidation provisions of the Educational Advancement Act was on small, weak, ineffective school districts, and while the effectiveness of schooling in Wilmington at this time has been disputed, it is clear that Wilmington had larger staffs and better programs than many Delaware school districts.[25] Moreover, Wilmington had historically been treated distinctively in Delaware education, and there is evidence that its representatives were unwilling to forego certain aspects of this special treatment.[26] No language in the provisions at issue makes any reference to race, nor evidently, did the legislative debates over the Act contain any reference to race.[27] Finally, all Wilmington

23. All statistics are from or derived from PX 21.

24. Plaintiffs point out, for example, that serious racial disorders occurred in Wilmington in the spring of 1968 and that the National Guard patrolled the City for several months thereafter. T. 953-55.

25. T. 1136-37, 2518-20, 2607-10; PX 210(u), pp. 26-27.

26. T. 2200-04; DX 156-59; T. 2097-98; PX 210(v), pp. 45-48. Not all distinctive features of the Wilmington School District, however, are evidence of the relative autonomy of Wilmington. In 1965, for example, the General Assembly passed legislation giving the Governor power to appoint the members of the Wilmington School Board and repealing the previous system of local elections. 55 Del. Laws Ch. 172. No other school board in New Castle County, except the county-wide Vocational-Technical District, is appointed by the Governor. The Alexis I. DuPont Board of Education is appointed by the Resident Judge of the Superior Court for New Castle County. 14 Del. C. § 1062.

27. DX 166.

legislators, black and white, voted for the Educational Advancement Act. In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization. Effective, as well as intentional racial classifications, however, require special scrutiny under the Equal Protection Clause.

The effect of the exclusions from the State Board's power to develop "an effective and orderly reorganization" of the school districts in Delaware was twofold. First, the two largest districts in the State, Wilmington and Newark, were required to remain intact. Second, in New Castle County, 75% of all black children, who attended school in the only majority black district, could not have been included in any consolidation plan had the Board wished to do so. Plaintiffs contend that the latter effect constitutes a proscribed racial classification.

It is well established that any law that classifies groups according to a "suspect classification" is not entitled to the ordinary presumption of constitutional validity.

> Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose or effect is to create classes based upon criteria that, in a constitutional sense, are inherently "suspect". Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. See, e.g., Brown v. Board of Education, 347 U. S. 483; McLaughlin v. Florida, 379 U. S. 184.
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> San Antonio School District v. Rodriguez, 411 U. S. 1, 61 (1973) (Stewart, J., concurring).

If a statute embodies a racial classification, it can withstand scrutiny under the fourteenth amendment only if its distinctions can be justified by a "compelling" state interest, Loving v. Virginia, 388 U. S. 1 (1967), and if the State could not have accomplished its goal by less restrictive means. McLaughlin v. Florida, *supra;* Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1101-02 (1969).

A statute which treats racial problems differently than related governmental interests constitutes a suspect racial classification. In Hunter v. Erickson, 393 U. S. 385 (1969), the Supreme Court held unconstitutional an Akron city charter amendment which prevented the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the prior approval of a majority of Akron voters. The Court found that the amendment placed special burdens on racial minorities seeking to end housing discrimination compared to those who sought to regulate real property transactions in the pursuit of other ends. The result was "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." 393 U. S. at 389. In Lee v. Nyquist, 318 F. Supp. 710 (W. D. N. Y. 1970), aff'd, 402 U. S. 935 (1971), a three-judge court held that a New York statute prohibiting state education officials and appointed school boards from assigning students or re-districting to achieve racial balance in school attendance was an invidious racial classification. The court stated:

> With regard to all other matters affecting educational policy, the Commissioner has the authority to order local boards to act in accordance with state educational policies as formulated by the Board of Regents. . . . Section 3201(2), however, singles out for different treatment all plans which have as their purpose the assignment of students in order to alleviate racial balance. The Commissioner and local appointed officials are prohibited from acting in these matters only where racial criteria are involved. The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools. 318 F. Supp. at 719.

See also, Loving v. Virginia, *supra;* Bulluck v. Washington, 468 F. 2d 1096, 1116 (D. C. Cir. 1972) (Robinson, J., dissenting).

Hunter and *Lee* involved statutes explicitly affecting the ability of governmental bodies to deal with racial matters. Statutes that do not explicitly deal with race but have a pronounced racial effect, however, can also establish suspect racial classifications. In Reitman v. Mulkey, 387 U. S. 369 (1969), the Supreme Court affirmed a judgment of the California Supreme Court that a state constitutional amendment, which included no reference to race, encouraged private housing discrimination, in light of its "historical context", "immediate objective", and "ultimate effect". 387 U. S. at 373. The Supreme Court has frequently recognized that state electoral districting plans which contain no reference to race are suspect racial classifications if they operate to minimize or cancel out the voting strength of racial minorities. White v. Regester, 412 U. S. 755 (1973); Gaffney v. Cummings, 412 U. S. 735, 751 (1973); Burns v. Richardson, 384 U. S. 73, 88 (1966); Fortson v. Dorsey, 379 U. S. 433, 439 (1965). Moreover, state administrative procedures having the effect of racial classifications have been held constitutionally suspect, even where there is no explicit policy embodying a racial classification. Hawkins v. Town of Shaw, Mississippi, 461 F. 2d 1171 (5th Cir. 1972); Wright v. City of Brighton, Alabama, 441 F. 2d 447 (5th Cir. 1971), cert. denied 404 U. S. 915 (1971); Kennedy Park Homes Assn., Inc. v. City of Lackawanna, New York, 436 F. 2d 108 (2nd Cir. 1970), cert denied, 401 U. S. 1010 (1971); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920 (2nd Cir. 1968); Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W. D. Pa. 1973), app. dism. 495 F. 2d 1095 (3rd Cir. 1974). In sum, where a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve than other related governmental interests, the statute embodies a suspect racial classification and requires a particularly strong justification.

Several courts have made clear that educational authorities, both North and South, have an obligation to consider the racial

consequences of major educational policy decisions, even though a policy favoring integration may not be constitutionally required. In Swann v. Charlotte-Mecklenburg Board of Education, the Supreme Court noted:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities, . . .
>
> 402 U. S. 1, 16 (1971).

Similarly, Justice Powell, in his separate opinion in Keyes v. School District No. 1, Denver, Colorado, characterized the responsibilities of all school authorities as follows:

> A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction and curriculum opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integretion; and (iv) locate new schools, close old ones, and determine the size and grade categories with this same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind.
>
> 413 U. S. 189, 226 (1973).

In both Lee v. Nyquist, *supra*, and Hoots v. Commonwealth of Pennsylvania, *supra*, courts held that reducing racial isolation in schools is a legitimate educational goal that promotes the attainment of equal educational opportunity for all children. Thus, in establishing its statewide school reorganization plan, the State Board of Education should have been given the

opportunity to consider the impact of redistricting on racial isolation in schools.[28]

The Educational Advancement Act, however, precluded the State Board from considering the "integrative opportunities" of redistricting in New Castle County in any meaningful way. Because the vast majority of black school children and the only identifiably black school district in New Castle County were excluded from the reorganization powers of the State Board, the Board could not have significantly reduced the growing racial isolation in New Castle County schools had it chosen to do so. Section 1003 of the Act enjoined the Board to adopt explicit reorganization criteria in the following areas of legitimate educational concern: "topography, pupil population, community characteristics, transportation of pupils, use of existing school facilities, existing school districts, potential population changes and the capability of providing a comprehensive program of efficient and effective education." To the extent that "racial characteristics" was effectively excluded from this list of legitimate educational criteria for reorganization, the exclusion of Wilmington from the Board's power under the Educational Advancement Act constitutes a suspect racial classification.[29]

28. Indeed, as a matter of educational policy, it would have been reasonable to expect the State Board to consider the possibility of consolidating Wilmington with neighboring districts. For example, a survey team from New York University School of Education recommended in June, 1967 consolidation of all suburban districts with Wilmington in order to "resolve Wilmington's *long-term* problems—vocational, social, or educational." DX 68, p. 81. On the other hand, the record does not suggest that, but for the statutory exclusion from its reorganization authority, the State Board would necessarily have consolidated Wilmington with any other district.

29. To be sure, consolidation of Wilmington with neighboring school districts is still possible by a referendum approved by a majority of the voters in each district affected. 14 Del. C. § 1027. The mere availability of resort to a referendum, however, does not justify a racial exclusion from the power of governmental officials. Hunter v. Erickson, *supra*, at 392-393.

Not only did the Educational Advancement Act exclude Wilmington from the State Board's one-year reorganization powers, but its

That the Newark District was also excluded from consolidation by the terms of the Educational Advancement Act[30] does not mitigate the racially specific effect of the Act. This Court's recent opinion held that at the time the Educational Advancement Act was enacted, the State Board had not yet satisfied its obligation to eliminate the vestiges of *de jure* segregation in the Wilmington schools. Whether or not the Board would have been required to adopt a desegregation plan beyond the boundaries of Wilmington in the absence of the Educational Advancement Act, it is clear that the Act made consolidation promoting racial balance substantially less accessible than other educational strategies. Because the Educational Advancement Act, racially neutral on its face, had a significant racial impact on the policies of the State Board of Education, it constitutes a suspect classification.

Three governmental interests have been asserted as providing "compelling" justification for the exclusion of Wilmington from school district reorganization. First, the drafters of the Educational Advancement Act believed that under the Delaware Constitution no statute could alter the boundaries of the Wilmington School District unless passed by a two-thirds majority of each house of the General Assembly. T. 1813-15, 2190-99, 2232-35, 2416. The supporters of the Act, therefore, favored exclusion of Wilmington in order to secure passage. Even assuming that the purported constitutional requirement could be a compelling interest justifying the exclusion of Wil-

reasonable and foreseeable result was to reduce the likelihood that suburban districts would consolidate with Wilmington in the future. The Conrad and Mount Pleasant Districts, for example, were expanded "outward" making them less likely candidates for voluntary consolidation "inward" with Wilmington.

30. A letter of October 18, 1968, from the State Superintendent to the members of the State Board of Education states:

> "A limit of 12,000 pupils was inserted [in the Educational Advancement Act] to avoid consolidating any other district with Wilmington." PX 154(a).

mington,[31] this Court can only conclude that as a matter of law, no two-thirds majority requirement existed. Article IX, Section 1 of the Delaware Constitution provides in relevant part: "No general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly." Defendants argue that because the Wilmington City Charter, which includes a provision specifying the boundaries for the Wilmington School District, was a special act of incorporation adopted by a two-thirds vote in 1905, a like majority is required to change the Wilmington District boundaries. However, in In re School Code of 1919, 108 A. 39 (Del. Sup. 1919), the Supreme Court of Delaware held to the contrary:

> The General Assembly is required by Article 10 to provide for the establishment and maintenance of a general and efficient system of public schools, but there is no requirement that legislation thereunder shall have the concurrence of two-thirds of each House. . . . [School districts] are agencies of the State government, created for the purpose of aiding in carrying out the requirements of the Constitution respecting the establishment and maintenance of a public school system and may be altered or abolished by the Legislature at any time. We must, therefore, assume that any legislative act that constitutes a part of the general system of public schools, including acts incorporating school districts, and Boards of Education, requires only a concurrence of a majority of all the members elected to each House.
>
> 108 A. at 42.

This reasoning was reaffirmed in an advisory opinion by that Court on the constitutionality of school bonds pursuant to the Educational Advancement Act. Opinion of the Justices, 246

31. As a matter of law, however, political expediency cannot be a compelling state interest justifying a racial classification. See, Monroe v. County Board of Commissioners, 391 U. S. 450 (1968); Cooper v. Aaron, 358 U. S. 1 (1958); Buchanan v. Warley, 245 U. S. 60, 80-81 (1917).

A. 2d 90 (Del. Sup. 1968). Compare, Opinion of the Justices, 252 A. 2d 164 (Del. Sup. 1969). In short, the Delaware Constitution did not require a two-thirds majority for passage of a statute making the Wilmington School District eligible for consolidation, and an erroneous belief to the contrary cannot be constitutionally "compelling".

A second interest advanced by the defendants is that the Wilmington city and school district boundaries have been coterminous for many years. It is undisputed that the establishment of the Wilmington city limits as the school district boundary in 1905 was racially neutral. It is also beyond question that the Wilmington School District had frequently received special legislative and administrative treatment prior to the enactment of the Educational Advancement Act. While historic community boundaries[32] should be given substantial weight by a court reviewing legislative districting decisions, the Wilmington school district boundaries were historically permeable. For many years, students from throughout New Castle County attended school in Wilmington, and the only black high school in the County, Howard, was located in Wilmington. In the 1954-55 school year, for example, approximately 1,100 pupils (roughly 9% of the total Wilmington enrollment that year) from suburban New Castle County attended Wilmington schools as transfer students. PX 157. For many years, vocational-technical, hearing impaired, blind, orthopedically handicapped, and pregnant students have crossed the Wilmington school boundaries to attend special educational programs. Pretrial Order, Stipulations 37-39. Moreover, as noted previously, the General Assembly has passed legislation expressly to subsidize the inter-district transportation of private and parochial school students; students crossing the Wilmington district lines to attend private or parochial schools

32. There are no geographic barriers separating Wilmington from the surrounding communities, and geographic boundaries have not been asserted by the defendants in support of the exclusion of Wilmington from the Educational Advancement Act.

were not excluded from the subsidy. Thus, the Wilmington School District limits have frequently been disregarded in the name of educational interests thought to be overriding. Furthermore, no other city boundaries in Delaware were incorporated into the Educational Advancement Act. This Court cannot conclude, therefore, that maintenance of the historic Wilmington district intact constitutes a compelling state interest justifying the exclusion in the Educational Advancement Act.[33]

Defendants next assert that district size is a compelling justification for excluding Wilmington from reorganization under the Educational Advancement Act. Even if Wilmington had not been excluded expressly from the State Board's reorganization powers, it, as well as the Newark School District, was excluded by § 1004(c)(2) of the Act, which provided: "Each proposed school district including more than one component former school district shall have a pupil enrollment of not less than 1900 nor more than 12,000 in grades 1 through 12." The legislature's reason for imposing a maximum size limitation on reorganized districts was succinctly articulated by Representative Heckert, Chairman of the House Education Committee:

> The criteria were put in specifically so that we didn't evolve into large unwieldy districts. At that time there was terrible trouble in the large school districts all across the country with demands for community control, which I sympathize

33. It is noteworthy that "existing school districts" was one of the factors that the State Board was required to consider in drawing up its reorganization plan. 14 Del. C. § 1003. Thus, the historic distinctiveness of the Wilmington School District could have been considered by the State Board in deciding whether to consolidate Wilmington with other districts, had not the legislature conclusively exempted Wilmington from the Board's consideration. In this respect, the legislature's goal of deference to the historic Wilmington boundary might have been achieved by a less restrictive means.

Furthermore, this Court found in Sincock v. Gately, 262 F. Supp. 739, 824-26 (D. Del. 1967) (three-judge court) that the historic political boundary of Wilmington did not justify the disparities between Wilmington and suburban legislative districts in Delaware's reapportionment plan.

> with, because the essence of the Democratic process is, you don't want a district so large that the people whose children go to that school feel they cannot control it.
>
> T. 1086.

In other words, the 12,000 limitation embodied a legislative judgment that if the State Board were allowed to create larger districts, the districts might well be administratively unmanageable and might lack community involvement in education.[34]

Dr. George Kirk, Superintendent of the Newark School District, testified that educators in Delaware generally felt that the optimal maximum size for a school district is "somewhere in the vicinity of 8 to 15, maybe 20,000 students." T. 224.[35] Dr. Kirk also testified that there is considerable debate nationally among educators as to the desirable maximum, but that there is a consensus around 30,000 students. T. 225-226, 260-65, 269-72. See also, Final Report of the State Board of Education Advisory Committee on School District Reorganization, May, 1967, DX 97. Dr. Gordon Foster, Professor of Education at the University of Miami, Coral Gables, Florida, and a specialist in educational administration, testified that recent research indicates that districts having enrollments larger than 75,000 students seem to require decentralization whereas districts smaller than that figure do not. T. 1433-38, 1643-50. Finally, Dr. Richard Gousha, formerly State Superintendent of Public Instruction, testified that the Milwaukee School District, of which he is presently superintendent, can be effectively administered even though the total enrollment is approximately 125,000. T. 2637-39.

34. See also, T. 228, 1097-98.

35. Nothing in the Educational Advancement Act placed a limit on the growth of school districts. Indeed, by the 1973-74 school year, the total enrollment of the Wilmington district had declined to 14,688, while the Newark district had become the largest district in the State, with an enrollment of 16,477. PX 15. By 1985, the Newark district is expected to have an enrollment of 28,000. T. 270.

In short, there is substantial disagreement among professional educators as to the desirable maximum size for school districts. In these circumstances, a decision that reorganized school districts should not have enrollments greater than 12,000 is certainly rational, but a substantially greater maximum district size would also be rational. This Court cannot find the statutory maximum enrollment sufficiently compelling to justify the racial classification in the Educational Advancement Act. No state interest in small school districts required the legislature to prevent the State Board from balancing district size against other legitimate criteria in drawing up a reorganization plan.

Neither the purported requirement in the Delaware Constitution, nor the interest in preserving a historic school district boundary, nor the interest in maintaining districts with enrollments below 12,000 is compelling, individually or cumulatively. Accordingly, the language of the Act excluding Wilmington from consideration by the State Board for reorganization violates the Equal Protection Clause.

Moreover, the unconstitutional exclusion of Wilmington from eligibility for consolidation plainly constitutes an "inter-district violation" under Milliken v. Bradley. Justice Burger, writing for the majority, stated the pre-requisite for a cross-district remedy as follows: "Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation." 42 L. W. at 5258. Here, the racially discriminatory exclusion of Wilmington prevented the State Board from considering whether sound educational principles dictated a consolidation of Wilmington with other school districts. But for this racial classification, the Board may have consolidated Wilmington with other New Castle County districts, with the result that the racial proportions of the districts would have been altered significantly. Even though the State Board may not have been required to alter the Wilmington District, this Court

cannot find that the exclusion from the Board's powers was racially insignificant. On the contrary, the reorganization provisions of the Educational Advancement Act played a significant part in maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts. In short, the General Assembly "contributed to the separation of the races by . . . redrawing school district lines," Milliken v. Bradley, 42 L. W. at 5261 (Stewart, J., concurring).[36]

V.

Having determined that the applicable law authorizes consideration of inter-district as well as Wilmington-only remedies for school segregation in New Castle County, this Court will proceed to evaluate the alternative plans to be submitted by the parties. In devising an appropriate remedy, this Court will be guided by the cautionary language of *Milliken:* ". . . the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." 42 L. W. at 5258. The victims of the discrimination are the school children of Wilmington. This Court cannot speculate on the scope of the proper remedy.[37] In light of the language in *Milliken* stressing the mechanical infeasibility of inter-district desegregation in Detroit, however, it is appropriate to note certain differences between the schools in New Castle County and those in Detroit.

36. School district reorganization pursuant to the Educational Advancement Act amounted to educational redistricting. Invidious discrimination in such redistricting is perforce an "inter-district violation". The Educational Advancement Act "redrew" the Wilmington School district lines by removing the existing Wilmington boundaries from the State Board's discretion at the same time that other school districts in Delaware were eligible for consolidation.

37. The dissent expresses the view that our additional findings will "necessarily end in some form of inter-district busing of students, both into and out of Wilmington. . . ." Our request for both Wilmington only and inter-district plans makes it clear that we do not subscribe to that view.

The New Castle County population is less than one-tenth that of the Detroit metropolitan area; Wilmington's is one-nineteenth that of Detroit. The proposed *Milliken* remedy would have involved three counties and fifty-four school districts; any remedy here would be confined to New Castle County and, at most, twelve school districts. There were 779,000 students in the Detroit "desegregation area", but there are only 87,696 in all of New Castle County.

As discussed previously, provision for inter-district school attendance is contrary neither to Delaware tradition nor experience. The Educational Advancement Act provided for state-wide consolidation of districts. The Act's drafters devoted significant time and effort to developing mechanics for school district consolidation in Delaware. See, e.g., 14 Del. C. §§ 1005-1010, 1027-1028; T. 1090.

Because of Delaware's history and demography, inter-district arrangements short of consolidation have been essential to education, and they continue today. The relative sparsity of suburban population required suburban districts until the 1950's to pool their white students with Wilmington, and with each other,[38] and to concentrate many of their black students in Wilmington. Even today there is a County-wide Vocational-Technical School District, and there are special schools located in individual district which draw their students from all County districts.

To facilitate inter-district programs, the State has employed a voucher system. All district funds are kept by the State Treasurer in a district account in a Dover bank. Transactions between districts and between the State and districts are effected by voucher between such accounts. Most educational programs in

38. For example, children of high school age in the Alfred I. DuPont District were transported, at State expense, either to Wilmington or the Alexis I. DuPont District. T. 1118, 2108-11. To the extent that children in suburban districts were sent to other districts equipped with high schools, "local control" included control of the education of high school students from "sending" districts by parents of children in "receiving" districts. See also, Note 26, *supra*.

Delaware are funded by the State through the voucher system, at different levels: transportation (100%); major capital construction (60%); annual operating budget (70%).[39]

The mechanics of an inter-district remedy here would pose few administrative problems of first impression. The inter-district history of Delaware education is different from that of large geographical areas with regional populations sufficient in size to have been traditionally independent. While district consolidations were not unusual in Michigan, it was never necessary there to reorganize districts on a state-wide basis; nor did geography make it necessary to devise attendance schemes there on a county-wide basis.[40]

VI.

In conclusion, we have found (a) a historic arrangement for inter-district segregation within New Castle County, (b) significant governmental involvement in inter-district discrimination, and (c) unconstitutional exclusion of Wilmington from consideration for consolidation by the State Board of Education, pursuant to reorganization powers now lapsed.

Accordingly, we hold:

1. Those provisions of the Educational Advancement Act of 1968, 14 Del. C. § 1001 *et seq.*, excluding the Wilmington School District from eligibility for consolidation are hereby declared unconstitutional.

2. The parties will be ordered to submit to the Court alternative plans to remedy the segregation found by the Court in this

39. Pre-trial Order, Stipulations 24-30.

40. It has already been noted that the entire County here "is smaller geographically and has approximately the same enrollment as the Charlotte-Mecklenburg district which was involved in *Swann I* and *Swann II*." Evans v. Buchanan, 379 F. Supp. at 1230 (Opinion of Gibbons, J.). Additionally, the County contains no geographic barriers—a significant problem in the Charlotte-Mecklenburg district.

opinion and in the opinion of July 12, 1974, (a) within the present boundaries of the Wilmington School District, and (b) incorporating other areas of New Castle County.

Submit Order.

Circuit Court Judge

Senior District Court Judge

March 27, 1975.

LAYTON, *District Judge* (dissenting):

1. FINDINGS OF FACT.

Following an evidentiary hearing, the majority has made sweeping findings of fact relating to discrimination in school affairs, real estate transactions and public housing. It is found that in the past 20 years there has been a striking demographic change in residential population which has substantially affected school attendance patterns; that Wilmington is now heavily black; that as of 1954, many suburban blacks attended schools in Wilmington and suburban whites did the same, and that subsequent to *Brown I* (although these interdistrict attendance practices were ended), Wilmington schools became identifiably black; that nearly all schools in Wilmington which were formerly white and segregated are now identifiably black; that racial disparity between city and suburbs was brought about by such governmental actions as the publishing of an F. H. A. mortgage manual in 1936 which advocated racial and economic homogeneity of neighborhoods; that these racial neighborhood patterns were further encouraged by the F. H. A. as late as 1949 by the manner in which it issued mortgages; that State and local government has also been responsible for residential segregation; that Wilmington still maintains an identifiably dual school system, and that the State encourages the attendance of white Wilmington students at suburban private and parochial schools.

These findings, superficially read, would seem to make out a case in support of Plaintiffs' charges of interdistrict discrimination through State action. More carefully examined against the evidence, I find in them nothing of sufficient substance to be the basis for an interdistrict remedy.

Schools.

Findings to the effect that prior to 1954 there were interdistrict transfers of black and white students from the suburbs into Wil-

mington which affect present-day school attendance are, to my mind, a *non-sequitur*. The majority acknowledges, but gives no significance to, the reasons for such arrangements—that two decades ago, Wilmington had better educational facilities, full twelve-grade programs, etc. They acknowledge that these practices have not existed for years. But, finding that after the termination of these interdistrict transfers Wilmington's schools became identifiably black, the majority apparently infers that the present black population is in part the result of such transfers. There is no evidence to support such a conclusion.

Milliken has made irrelevant to interdistrict relief our July 12 finding that Wilmington's schools retain vestiges of the former dual system. The Plaintiffs have pointed to no specific causal relationship between the existence of such vestiges and the relative racial composition of city and suburban schools, and the majority has made no concrete findings in this regard.

The only finding of any substance is that the State still supports transfers of students out of Wilmington to private and parochial schools in the suburbs. Even though blacks are not excluded from this program, and apparently neither are suburban students, it can reasonably be argued that it tends to discourage white students in Wilmington from attendance in Wilmington schools.

Real Estate.

There are a number of findings having to do with discrimination in real estate transactions. The finding that the great increase in black population in Wilmington in the past 20 years is, in part, due to assistance, encouragement and authorization by governmental policies is, in my opinion, a conclusion unsupported by real credible evidence. The Federal Housing Administration practices alluded to were terminated more than 21 years prior to commencement of this action.[1]

1. By "this action," I refer to the 1971 petition for supplemental relief in this case, which originated in 1957.

Real estate agents testified that racial discrimination still exists in real estate sales. Others denied this. There was "manufactured" evidence of white owners allegedly refusing to sell homes after finding that the potential purchasers were black. The real estate salesmen directly concerned bitterly denied this. Wisely, the majority gives no weight to such evidence. However, the findings do note that the Recorder of Deeds of New Castle County accepted for recording deeds which contained racially restrictive covenants. And the Code of Ethics of the National Association of Real Estate Boards, which was reprinted by the Delaware Real Estate Commission, contained a statement cautioning realtors from "introducing into a neighborhood . . . members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values. . . ."

My impression of this evidence at the conclusion of the trial was (and still is) that it fell flat. Much of the record concerns circumstances which are not the result of State action. The majority concedes that twenty-seven years ago the Supreme Court declared racial covenants contained in deeds to be of no legal effect.[2] The majority cites no authority requiring the Recorder of Deeds to cull out and delete this sort of material from the numerous deeds filed daily for recording; nor does it attribute any specific legal significance to failure to cull out such language. In my judgment, the only hard evidence of State action appearing in the mass of evidence dealing with real estate discrimination is the State publication, until 1970, of the N. A. R. E. B. Code of Ethics. Moreover, this Code was not exclusive to Delaware; presumably it extended nationally, from Maine to Georgia, and from Washington, D. C. to California.

Public Housing.

Finally, there were a number of findings concerning racial discrimination in public housing. In the main, these findings show that little or no public housing has been built in suburban

2. Shelley v. Kraemer, *supra*.

New Castle County, but that in Wilmington, which is heavily black, over 2,000 units have been erected. The inference is that this tends to confine blacks within the city limits.

The Court also finds: "The several attempts by the County Housing Authority to fund public housing developments at suburban sites have met with vigorous opposition from neighborhood groups and have been unsuccessful in gaining the necessary rezoning or site approval from the New Castle County Council." This finding, on the one hand, virtually concedes that failure of the New Castle County Housing Authority to create public housing in the County is due to private, not State, action; but on the other hand, it leaves the unsupported inference that the fault lies with the County Council. Not a word is said as to the reasons why the necessary rezoning permission was withheld; how many petitions were filed; why they were denied; and whether, upon denial, appeals were taken.

In my view, the majority's findings, so sweeping in effect, so heavy with inferences but so lacking in concrete, relevant substance, have fallen far short of fixing the responsibility for interdistrict racial discrimination upon Defendants' shoulders. What the majority does not face up to is that there seems to be no definitive explanation for the huge tide of black immigration into the nation's cities, and the white flight therefrom, in the past two decades. One theory based upon persuasive logic is that the cause is economic; that thousands of blacks have left the South and other predominantly rural areas in the past twenty years out of a natural desire to seek the better job opportunities and higher wages available in the cities. There they have settled and, as is true of most ethnic groups, have tended to band together.

Other thinking on this subject is that there simply is no definitive answer to the situation. The Fourth Circuit Court of Appeals, in language which with little change would, in my judgment, reflect exactly what has happened in Wilmington, has said:

> "We think that the root causes of the concentration of blacks in the inner cities of America are simply not known and that the district court could not realistically place on the counties the responsibility for the effect that inner city decay has had on the public schools of Richmond. We are convinced that what little action, if any, the counties may seem to have taken to keep blacks out is slight indeed compared to the myriad reasons, economic, political and social, for the concentration of blacks in Richmond and does not support the conclusion that it has been invidious state action which has resulted in the racial composition of the three school districts. Indeed this record warrants no other conclusion than that the forces influencing demographic patterns in New York, Chicago, Detroit, Los Angeles, Atlanta and other metropolitan areas have operated in the same way in the Richmond metropolitan area to produce the same result. Typical of all of these cities is a growing black population in the central city and a growing white population in the surrounding suburban and rural areas. Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend. That there has been housing discrimination in all three units is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 24, 91 S. Ct. 1267, 28 L. Ed. 554."[3]

In any case, I cannot agree that the disparity in residential and school populations between Wilmington and its suburbs is the result of discriminatory State action.

II. The Educational Advancement Act.

The majority has further found the Educational Advancement Act unconstitutional. But as the Court said in *Milliken*, ". . . without an interdistrict violation and interdistrict effect,

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3. Bradley v. School Board of City of Richmond, 462 F. 2d 1058, 1066 (4 Cir. 1972). *See Milliken*, 42 L. W. at 5261 n. 2 (concurrence of Justice Stewart), and *Keyes*, 413 U. S. at 222-224 (concurrence of Justice Powell).

there is no constitutional wrong calling for an interdistrict remedy."[4] Even if the Act unconstitutionally specified that Wilmington's historic boundaries not be disturbed, I fail to see how this changed the *status quo* so as to have interdistrict effect.[5]

In any event, I question the conclusion that the EAA, in reestablishing the lines of the city coterminously with the district, constituted a suspect racial classification. These district lines were not "deliberately drawn on the basis of race." *Milliken*, 42 L. W. at 5258. The majority concedes that "(w)e cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington District from school reorganization were purposefully racial discriminatory." They go on to say that ". . . the record does not demonstrate that a significant purpose of the EAA was to foster or perpetuate discrimination through school (district) reorganization. . . . (T)he focus of the legislature's concern in developing the consolidation provisions of the EAA was on small, weak, ineffective districts. . . ."

Actually, the EAA did not establish new boundary lines for Wilmington. It maintained existing lines—lines which had existed for ¾ of a century and were based upon a reasonable and rational conclusion that a school district of approximately 15,000 was about the right size for effective administration. These lines historically had given Wilmington certain educational perquisites which it could afford and did not wish to surrender.[6] The only duty owed Plaintiffs, as I see it, was to see that the Wilmington district maintained a unitary school system (which it has not done—but the remedy for this has been set in motion by our July 12 opinion). Failure of the EAA to correct this violation, in the context of the goals and scope of the Act, does not, in my view, constitute a suspect classification of black Wilmington students.[7] My conclusion is that the EAA is not unconstitutional; but even if it is, it has had no interdistrict effect.

4. 42 L. W. at 5258.
5. T. 1171-72, 1835-36, 2311. *See* n. 12 and text thereto, *infra*.
6. See n. 13 and text thereto, *infra*.

III. Alternate Findings.

The findings of fact and conclusions of law by the majority, with which I have already expressed disagreement, will in my view necessarily end in some form of interdistrict busing of students, both into and out of Wilmington, a result contrary to that arrived at in *Milliken* v. *Bradley*. Thus, anything further I may say will be only a cry in the dark. However, I should very briefly like to say this: were my view of the facts to control, I would find that—

(1) Prior to *Brown I* Delaware, a "border state", was, beginning a few miles south of Wilmington at the Delaware and Chesapeake Canal and extending down to its southern border, a rural area embodying many southern manners, traditions and customs;

(2) It maintained a *de jure* dual system of schools;

7. In this respect, this case is similar to Bulluck v. Washington, 468 F. 2d 1096, 1106-07 (D. C. Cir. 1972), *rehear. den.* There, the Court found a Congressional choice to educate certain students outside of the District of Columbia to *affect* a racial group, but not to classify it *racially*. Thus, the classification—that of students not granted "extra-territorial" education—was upheld by application of the "rational basis" test, rather than the "compelling state interest" test. Here, Wilmington and Newark, classified according to size, were effectively removed from State Board discretion for the one year consolidation period, so were treated differently from all other State districts. Considering the primary goal of the Act—to rationalize district size and administration—failure to provide affirmatively for integration of one of the cities classified according to size did not serve to classify that city (Wilmington), or its residents, according to race. Thus, the classification should survive scrutiny if rationally based, which the majority concedes it was. It should be noted that the EAA also eventually left undisturbed the existing boundaries of six other Delaware districts, four in New Castle County (Alfred I. DuPont, Alexis I. DuPont, Claymont, and DeLaWarr), and two in Sussex County (Laurel and Seaford). PX 21, 31; DX 39, 65, 66.

(3) Nevertheless, upon the advent of *Brown I* and *II*, Wilmington promptly dismantled its dual school system so that within a few years a black student could attend the school of his choice to the extent which seemed to comply with the commands of the Supreme Court;[8]

(4) In the lower counties there remained identifiably white and black schools, with white teachers for white schools and vice versa, separate schools for Moors, and varying kinds of school districts—Special, State Board and High School Attendance;[9]

(5) Dr. Cousha, a forward-looking educator, became State Superintendent of Schools in 1964 and accepted the challenge of gradually attempting to terminate this hodge-podge of black and white districts in the lower counties through vigorous administrative action. With the assistance of Dr. Row and others, and with the exercise of extreme tact as well as the cooperation of the State School Board, the program of dismantling the dual system in the two southern counties was finally accomplished by 1967;[10]

(6) At that time it was believed by the responsible authorities, including HEW, that the dual system of schools in the State had been substantially eradicated. In fact, HEW pointed to Delaware as the first border state which had "compietely eradicated the dual system."[11] Nor did these Plaintiffs, the NAACP, or other organizations, including the Wilmington School Board, indicate to the contrary;

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8. T. 1496; DX 11, 21, 139, 165. In our July 12 opinion, we found vestiges of that system still to exist. However, the identifiably black nature of Wilmington's present school population is due primarily to the large proportional increase in Wilmington's black population since *Brown I* and *II*.

9. T. 2096-2102, 2108-11.

10. T. 2134-38, 2587-2604; DX 50, 51, 52, 56.

11. T. 1797-98, 2606-07; DX 60.

(7) Even so, there remained very small districts, very large districts, some strong districts and some weak districts, and it was generally agreed that the school districts in the State, with the exception of Wilmington, needed consolidation;[12]

(8) Wilmington was a unique district. Its boundaries had been coterminous with the City for more than 60 years. It was a wealthy district and maintained a fine system of schools. It enjoyed certain perquisites such as the right to certify its own teaching staff and was regarded by many local educators as about the right size for efficient administration.[13] As the majority stated in its findings elsewhere, the "focus of the legislature's concern in developing the consolidation provisions of the EAA was on small, weak, ineffective districts," not the Wilmington District;

(9) With patience, determination and the loyal support of many legislators as well as private citizens, the EAA was gradually formulated, polished and repolished.[14] In the Legislature it was saved from crippling amendment by a single vote. It was the most important piece of education legislation ever passed in Delaware.[15] All Wilmington legislators, including two who testified on behalf of Plaintiffs, voted for it. As the majority found, ". . . the record does not demonstrate that a significant purpose of the EAA was to foster or perpetuate discrimination through school reorganization." No voice was raised by any of these Plaintiffs, their counsel, or any other body in opposition (on these grounds) when it passed in 1968, and no suit was filed challenging its constitutionality until the present action was

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12. T. 1136-37, 2607-08; PX 210(f) p. 15, 210(u) pp. 26-27.

13. 23 Del. Laws Ch. 92, 32 Del. Laws Ch. 163; T. 249-51, 1155-56, 1989-90, 2098, 2122-23; PX 210(v) pp. 46-48, DX 68 pp. vi-ix.

14. T. 1099-1102, 1138-1147, 1163-68, 1772-73, 2388-93, 2515-17, 2611.

15. T. 1103, 1148-49; PX 183 p. 3.

begun three years later. In fact, at the time this action was filed, the Wilmington School Board was not a party to it.[16]

(10) The Legislature still furnishes funds for the transportation of students from Wilmington to private and parochial schools in outlying districts. Black Wilmington students and students from other districts may take advantage of this program. Blacks, as a matter of sheer economics, have not been able to take advantage of this kind of interdistrict transportation on any large scale. However, the number of students who do participate is noticeably decreasing.[17]

(11) The Wilmington School District is infinitely smaller than that of Detroit. However, a study of the relevant statutes discloses that school districts in this State are at least as autonomous as in Michigan, and the two state systems of education are quite similar in most respects.[18]

IV. Conclusion.

In light of my view of the facts, it is my considered judgment that *Milliken* v. *Bradley* should govern the result in this litigation.

Both Detroit and Wilmington maintained and still maintain dual systems of schools,[19] but such constitutional violation has had no effect on any other district. The two school systems are quite similar and the school districts surrounding each city

16. T. 1154, 2613-14, 2618-19.

17. T. 2655-2667.

18. This is not inconsistent with the finding of this Court and the Third Circuit that the State Board is responsible for all phases of desegregation in Delaware. *See* 14 Del. C. §§ 1010, 1026-27, 1043, 1048-50, 1055-57, 1091, 1304, 1401, 1902, 2102-03; T. 1832; PX 210(g) p. 27. Compare 42 L. W. at 5257 n. 20.

19. The constitutional violations incident to the maintenance of the dual system in Detroit are far more serious and numerous than in Wilmington.

have committed no unconstitutional act having any effect on each other or on the two city districts involved. Each school board in Delaware has the power to collect additional taxes and issue bonds, and a number of districts do both.[20] Each district is relatively autonomous in the manner in which it operates its schools. To order an interdistrict transfer of students in this litigation would result, although concededly in a smaller way, in the necessity for this Court to solve many "complex problems" and in a sense be the "school superintendent for the entire area."[21] The EAA is not, in my opinion, unconstitutional; but, if so, it has no interdistrict effect. Viewing the record as a whole, I do not regard the furnishing of funds for an interdistrict transfer of students to parochial and private schools as sufficiently serious to take this case from the purview of *Milliken* v. *Bradley*.

In all important respects except size, the facts of *Milliken* and this case are strikingly similar. But *Milliken* is not a rule of size; it is a rule of law. Had this Court the option (which, pre-*Milliken*, appeared available to many courts) of curing *de jure* segregation by assigning students to schools in the surrounding districts, this could probably be done relatively easily here, although with considerable expense and interference in the administration of other school districts. But our task is to determine whether or not that approach, proscribed in *Milliken*, is available here. I find no constitutional violation in this case which would form the basis for an interdistrict remedy. I would direct that our recent opinion of July 12, 1974, be supplemented by a plan for the elimination of the dual system of education in Wilmington.

20. The actual details and number of districts levying additional taxes and having outstanding bond issues were not made part of the record.

21. 42 L. W. at 5257.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT,
For the District of Delaware.

BRENDA EVANS, et al.,
Plaintiffs,
vs.
MADELINE BUCHANAN, et al.,
Defendants.

Civil Action
Nos. 1816-1822

ORDER.

For the reasons stated in the Court's opinion of March 27, 1975, and July 12, 1973 it is

ORDERED:

1. The Defendant State Board of Education, the individual members thereof, their officers, agents, employees, attorneys and successors, and all those acting in concert or in participation with them, receiving actual notice of this order, be, and they are hereby, mandatorily enjoined to submit to this Court by the 8th day of August, 1975:

(a) a plan to remedy the segregation found by the Court within the present Wilmington School District; and

(b) a plan or plans to remedy the inter-district segregation found by the Court to exist in New Castle County. In preparing any inter-district plan, the Defendant State Board of Education is enjoined from relying upon those provisions of the Educational Advancement Act of 1968 found unconstitutional by this Court.

So ORDERED this 16th day of April, 1975.

/s/ JOHN J. GIBBONS
John J. Gibbons

/s/ CALEB M. WRIGHT
Caleb M. Wright

Judge Layton dissents in conformity
with this opinion of March 27, 1975.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT,
In and for the District of Delaware.

BRENDA EVANS, et al.,
Plaintiffs,

vs.

MADELINE BUCHANAN, et al.,
Defendants.

Civil Action
Nos. 1816-1822

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that Defendants, State Board of Education, Alexis I. DuPont School District, Alfred I. DuPont School District, Appoquinimink School District, Claymont School District, Conrad School District, Marshallton-McKean School District, Mount Pleasant School District, New Castle-Gunning Bedford School District, Newark School District, and Stanton School District, the Defendants in the above-entitled action, hereby appeal to the Supreme Court of the United States from the Order granting an injunction against the Defendants entered in this action on April 16, 1975.

This appeal is taken pursuant to 28 *U. S. C.* §1253.

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Supreme Court, U. S.
FILED
JUL 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1418

MADELINE BUCHANAN, ET AL., *Appellants*

v.

BRENDA EVANS, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Delaware

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1418

MADELINE BUCHANAN, ET AL., *Appellants*

v.

BRENDA EVANS, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Delaware

---

MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the District of Delaware entered on April 16, 1975 on the grounds that the appeal is not within the jurisdiction of this Court, and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The recent opinion of the United States District Court for the District of Delaware, Civil Action Nos. 1816-1822, March 27, 1975, is not yet reported. That opinion is set out in Appendix A of Appellants' Jurisdictional Statement. The earlier opinion in this case is reported at 379 F. Supp. 1218.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. XIV, SEC. 1: . . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Educational Advancement Act of 1968

14 Del. C. § 1001 *et seq.*, §§ 1004(c)(2)-(4).

(c) On or before March 1, 1969, the State Board of Education shall meet and adopt a final plan of reorganization of school districts which it deems wise and in the best interests of the educational system of this State; provided, that no plan of reorganization of school districts shall be adopted which fails to meet the following requirements: . . . .

(2) Each proposed school district including more than one component former school district shall have a pupil enrollment of not less than 1900 nor more than 12,000 in grades 1 through 12. "Pupil enrollment" as used in this subsection means enrollment as of September 30, 1968. Excluding vocational-technical districts there shall be no fewer than 20 nor more than 25 reorganized school districts.

(3) Each proposed school district which is composed of more than one existing school district shall be composed of only whole existing school districts except as herein defined and only to the extent that those whole existing school districts are contiguous as reorganized. No existing school district shall be subdivided in order to form any proposed school district except a superimposed high school district, which may be subdivided.

(4) The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits. . . . .

STATEMENT

In *Milliken* v. *Bradley,* 418 U.S. 717 (1974), this Court foresaw that circumstances might arise in public school segregation cases where the character of the violation would warrant a remedy that encompassed more than one school district. Such a violation of constitutional rights has occurred in school districts in New Castle County, Delaware, an area of some 435 square miles with approximately 87,000 public school students (A. 6, 32).*

The history of the proceedings giving rise to this issue is in some respects all too familiar to this Court. More than twenty-one years after this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), public schools in Wilmington, the core district in New Castle County, remain racially identifiable[1] and, as

---

* All references to the Appendix are made to the Appendix in Appellants' Jurisdictional Statement.

[1] Five public schools in Wilmington (three elementary, one junior high and one high school) that were designated as black schools before *Brown* and that were 90 to 100% black in 1956 re-

the court below held unanimously, previous school desegregation plans have never proved effective and a unitary school system for Wilmington has never been established. 379 F. Supp. 1218, 1223.

In one respect, even this history is unusal, for from the very outset of this case the appellant State Board of Education, because of the uniquely broad control it exercises over public education in Delaware has been the primary defendant and has been held directly responsible for the defaults that have occurred at several stages of these proceedings. Thus, when in 1957 the lower court found that no appreciable steps had been taken to effectuate compliance with the mandate of *Brown* in several Delaware districts, it was the appellant state board, which had been a party defendant in the original consolidated *Brown* case, that was culpable for this dereliction of constitutional duty. *Evans* v. *Buchanan,* 152 F. Supp. 886, 887 (D. Del. 1957), *aff'd,* 256 F.2d 688, 693-694 (1958). It was appellant's plan that was adjudged unsatisfactory by the court below in 1960 and the new desegregation order ran against the appellant. *Evans* v. *Ennis,* 281 F.2d 385, 390-391 (3d Cir. 1960). When a new plan was approved in 1961, it was appellant state board over whom the court retained jurisdiction to determine the effectiveness of the manner in which the plan was implemented. 195 F. Supp. 321, 325. And it was the appellant state board that was primarily responsible for the fact that despite the 1961 plan *de jure* violations in Wilmington persisted. 379

mained 90 to 100% black in 1973. 379 F. Supp. at 1223 n.8. Correspondingly, schools in other districts in New Castle County that were historically white remained 90% or more white in 1973, a fact that led one judge below to conclude that "it is not only in Wilmington that vestiges remain." *Id.* at 1229-1230 (Gibbons, J.).

F. Supp. at 1222-24. In 1971, a group of intervening plaintiffs filed an amended complaint alleging that a 1968 state statute reorganizing Delaware school districts had segregated black children in New Castle County within the Wilmington school district. Plaintiffs further alleged that the state-imposed dual school system had never been eliminated in Wilmington and New Castle County.

As the court below succinctly stated, "it is well established that to the extent that any schools in the state are in violation of *Brown* and its progeny or of this Court's orders, the State Board must bear primary responsibility." 379 F. Supp. 1218, 1222 (*see also* A. 2).

What makes this case materially different in its facts, however, from any this Court has previously considered is that not only did the appellant state board and other state officials participate in the perpetuation of segregation in the public schools of Wilmington, but they also contributed substantially to the creation and maintenance of a *de jure* segregated situation as between Wilmington and the surrounding school districts of New Castle County.

First, during the entire 21-year period when Wilmington schools have been out of compliance with the *Brown* mandate, Delaware state officials have pursued policies that have fostered racial segregation by providing new housing opportunities for whites in the suburbs of Wilmington while keeping black citizens largely contained within the Wilmington district (A. 10-11).

While the initial policies in which the Federal Housing Administration participated, by calling for the development of racially and economically homogeneous

neighborhoods as a condition for underwriting suburban mortgages, were formally terminated before the advent of the *Brown* decision, they contributed significantly to the initial establishment of segregated communities in New Castle County (A. 10). And overt state encouragement of racial discrimination in housing continued throughout the 1950s and 1960s in various forms: through the continued recordation of racially restrictive covenants (A. 10); through the Delaware Real Estate Commission's publication and sanction of the realtors' code of racial exclusivity (A. 10); through operation of a multi-list system by the Greater Wilmington Board of Realtors under which in the years 1965-67 only 7% of all new listings in the Wilmington suburbs were open to minority buyers (A. 11).

Delaware's policies of racial containment in housing were implemented not simply by encouragement and toleration of discrimination by the private housing industry but by practices of discrimination in housing provided directly by state officials. Thus, although the Wilmington Housing Authority until 1972 had jurisdiction to establish public housing units (whose eligible occupants are predominantly black (A. 12 n.13)), outside the city limits it was almost entirely unsuccessful in securing such sites (A. 11). And the New Castle County Housing Authority, established in 1972, was thwarted by the actions of the New Castle County Council and failed to build any new public housing units.

During the period from 1954 to 1973, the public school enrollment of New Castle County expanded from 21,543 children (of whom 4% were black) to 73,008 (of whom 6% were black) (A. 7). This large county popu-

lation growth corresponded with the growth of identifiably black schools in Wilmington which went from a 28% black system in student enrollment (with a total enrollment of 12,875) to an 83% black system (with a total enrollment of 14,688) (A. 7). As the court below found, these changes resulted "not exclusively from individual residential choice and economics, but also from assistance, encouragement and authorization by governmental policies" (A. 10).

Second, actions by Delaware school officials also contributed to the growth of segregated schools in New Castle County. Prior to 1954 and for a period thereafter, children in New Castle County were assigned across district lines on a segregated basis, leading the court below to find "a historic arrangement for interdistrict segregation within New Castle County" (A. 33). More recently, optional attendance zones established in the Wilmington school district allowed white students to attend schools in attendance areas other than those in which they resided (A. 12). The resultant increase in the proportionate black school population in the transferor schools, the court below found, may have encouraged an exodus of white families and "discouraged white families from moving in," the impact being felt in the racial composition of housing and schools in the suburbs as well as the city (A. 12-13). In addition, beginning in 1968 the state board implemented a substantial program of transportation subsidies for children attending private schools which included subsidies for travel across district lines (A. 13-14). While the interdistrict aspect of the program violated the provisions of the authorizing state statute, the Delaware legislature's response was to amend the statute in 1973 to authorize the previously illegal sub-

sidies. Noting that such non-public schools were 94% white, the court below concluded that the subsidy augmented the racial disparity between Wilmington and county school populations (A. 14).

The third major action contributing to the maintenance and perpetuation of segregated schools in the New Castle County area was the separate and disparate treatment given Wilmington by the Delaware legislature in a general reorganization of all Delaware school districts accomplished through the Educational Advancement Act of 1968. 14 Del. C. § 1001 *et seq.*[2] When the legislature acted in 1968 the Wilmington district was 66% black in its enrollment, well along in the process of becoming a separate black island in a predominantly white metropolitan area (A. 18). Nevertheless, Wilmington was specifically exempted by name from the grant of authority contained in the Act which constituted all districts in the state as "reorganized school districts" and established an expeditious procedure enabling the State Board of Education to consolidate contiguous districts (A. 18). The Act not only exempted Wilmington from these procedures but fixed the boundaries of the district to encompass only the territory within the City of Wilmington. 14 Del. C. § 1004(c)(4). Thus, the Wilmington lines were fro-

[2] In part, this statute was a response to the 1961 decree of the court below which called upon the state defendants to submit a new school code to the Delaware General Assembly, including provisions for consolidating districts to eliminate all distinctions based on race. At least two previous attempts by the State Board to do what in 1961 it told the court was necessary to eliminate a state-imposed, state-wide dual system had been rejected by the legislature. After those rejections no action was taken until 1968. 379 F. Supp. at 1221, 1232.

zen when virtually all other Delaware districts were made freely subject to change at a time when the actual, probable and foreseeable effect of the action was to foster racial segregation.

On the basis of such actions by the state legislature and by state officials having jurisdiction over schools and housing, the court below concluded that "governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades" (A. 17); that several interdistrict violations of the kind contemplated by *Milliken* had occurred (A. 31, 33); and that there was ample basis for requiring the preparation of a plan for interdistrict relief to be considered along with intradistrict plans in determining a feasible remedy that would redress the denial of appellees' constitutional rights.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED AS PREMATURE SINCE NO INJUNCTION HAS ISSUED INTERFERING WITH THE OPERATION OF THE CHALLENGED STATE STATUTE.

Appellants' effort to obtain review of this case is premature because no injunctive relief has been granted from which an appeal will lie under 28 U.S.C. § 1253. The unambiguous language of § 1253 and a consistent line of decisions by this Court make it clear that the indispensable predicate of an appeal is an injunction, either interlocutory or permanent, interfering with the operation of the challenged statute. *Gerstein* v. *Coe*, 419 U.S. 98 (1974); *Gunn* v. *Committee to End the War*

in Vietnam, 399 U.S. 383 (1970); *Goldstein* v. *Cox,* 396 U.S. 471 (1970).

No such injunction has issued in this case. What the court below did was to *declare* that provisions of Delaware's Educational Advancement Act of 1968, 14 Del. C. § 1001 *et seq.,* were unconstitutional insofar as they excluded the Wilmington School District from eligibility for reorganization with other districts (A. 33). At this stage of the proceedings the only effect of this declaration is to assure that the court will consider plans for interdistrict relief along with plans for intradistrict relief in determining what remedy to afford to individual appellees, whose constitutional rights, as all parties acknowledge in this Court, have been violated. The court below has yet to make findings that will be critical in determining whether the ultimate form of relief to be granted will involve other districts or will be wholly within the district of Wilmington. The opinion recognizes that before ordering any form of interdistrict relief, the court must examine whether such a remedy is necessary "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (A. 31, *citing Millken* v. *Bradley,* 418 U.S. 717, 746 (1974)), and the court indicates that it must determine if such relief is feasible under the principles set down by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22-26 (1971) (A. 31-33).

The court below prudently decided that these critical determinations could best be made in the light of concrete alternative plans for intradistrict and interdistrict relief proposed by the parties. Lacking these plans, which are to be considered in the Fall of 1975,

the court said that it "cannot speculate on the scope of the proper remedy" (A. 31).[3]

Thus, the constitutional issues on which appellants would have this Court rush to judgment may never arise. Should the court below conclude in further proceedings that on any of the grounds left open by its opinion of March 27, 1975, relief must be confined to the Wilmington school district, an order for interdistrict relief will never issue. In the interim, the court's declaratory judgment that the Educational Advancement Act is unconstitutional has no prejudicial effect upon any of the parties. It does not command or inhibit action by the State Board of Education with respect to any other area of the state, and indeed the reorganization powers granted by the Act have long since lapsed (A. 33). The only consequence of the declaratory judgment is that appellants may not rely upon the Act in preparing plans for the court to consider in deciding what type of injunctive relief it will ultimately issue.

This may seem an inconvenience to appellants but it no more constitutes interference with the operation or enforcement of a state statute than the lower court decisions in *Gunn* and *Gerstein, supra,* which this Court appropriately declined to review. Nor does it remotely approach action which "paralyze[s] totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order," justifying direct and rapid

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[3] While the court would not speculate about the ultimate scope of remedy, appellants apparently feel free to do so in implying throughout their statement that the court has already undertaken to impose an interdistrict remedy (*see, e.g.,* Appellants' Jurisdictional Statement at 5, 12). Yet such speculation will not prevent appellants from arguing forcefully in further proceedings that interdistrict remedy is not feasible.

review by this Court of a lower court decision. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154 (1963). Lacking such action by the court below, there is every reason for this Court to dismiss the appeal in light of appellants' failure to meet jurisdictional requirements and in view of sound considerations of judicial economy.[4] Appellants will have time enough to obtain a full review of their claims if the injunctive order they now apprehend looming on the horizon actually materializes.[5]

II. AFFIRMANCE OF THE DECISION BELOW IS DICTATED BOTH BY THE PRINCIPLES OF MILLIKEN AND ALLIED CASES AND BY ESTABLISHED EQUAL PROTECTION DOCTRINE REQUIRING INVALIDATION OF UNJUSTIFIED RACIAL CLASSIFICATIONS.

A. The Decision Below Is Consistent With Principles Enunciated by This Court in Milliken v. Bradley and With Decisions of Courts of Appeals Rendered Both Before and After Milliken.

While appellants understandably prefer to focus upon only those portions of *Milliken* which state the

[4] While the statutory considerations are somewhat different it is relevant to note that school desegregation cases ordinarily reach this Court for discretionary review only after lower courts have ruled both on questions of liability and appropriate remedy together. *See, e.g.,* Keyes v. School Dist. No. 1, Denver, 445 F.2d 990 (10th Cir. 1971) *modified* 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), *rev'd,* 402 U.S. 1 (1971); Taylor v. Bd. of Educ. of New Rochelle, 191 F. Supp. 181 (S.D.N.Y. 1961), *appeal dismissed,* 288 F.2d 600 (2nd Cir. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961), *aff'd,* 294 F.2d 36 (2nd Cir. 1961), *cert. denied,* 368 U.S. 940 (1961). In the rare case where this Court has reviewed a school desegregation case in the absence of an approved plan for remedy, the courts below have at least determined specifically the type of relief to be afforded. *See* Milliken v. Bradley, 418 U.S. 717 (1974).

[5] Hearings in the court below on proposed interdistrict and intradistrict plans are not scheduled to begin until October 20, 1975. No plans for pupil reassignment for the 1975-76 school term have been proposed by any of the parties.

basis for denying relief, this Court quite carefully limited that decision to the factual record before it and took pains to delineate circumstances in which it would be appropriate to find a violation leading to interdistrict relief. In the view of the Justices in the *Milliken* majority, a "cross district remedy" may be justified if:

> 1. "[D]istrict lines have been deliberately drawn on the basis of race," 418 U.S. at 745, or state officials "contributed to the separation of the races by drawing or redrawing school district lines," *id.* at 755 (Stewart, J. concurring); *or*
>
> 2. There has been a constitutional violation within one district that produces a significant segregative effect in another district, *id.* at 745; *or*
>
> 3. State officials "had contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing or zoning laws," *id.* at 755 (Stewart, J. concurring).

With this decision before it, the court below carefully examined all of the evidence before finding that such violations had occurred in each of the categories enumerated. Appellants' entire argument rests upon a procrustean effort to stretch, bend and twist the facts of this case to make them fit those of *Milliken* and other decisions in an attempt to convince this Court that the issues have already been decided. But, as will be shown, Wilmington presents new facts, materially different from those in *Milliken.* Indeed, the lower court's conclusions here were entirely consistent with the opinion in *Milliken* and with numerous courts of appeals decisions rendered both before and after the *Milliken* decision.

1. Delaware's Redrawing of School District Lines

Under the Educational Advancement Act of 1968 all districts in the State of Delaware became "reorganized school districts" and an expeditious procedure was established to enable the State Board of Education to consolidate contiguous districts (A. 18). The only named exception in the Act was the Wilmington School District, which at the time of enactment was 66% black in student enrollment and contained 44% of all black pupils in Delaware public schools.[6] As to the reorganized Wilmington district, the Act flatly stated that the boundaries were fixed to encompass only the territory within the City of Wilmington. 14 Del. C. § 1004(c)(4).

We demonstrate *infra* that principles of equal protection firmly established by this Court require that such a statute be invalidated as a prohibited racial classification absent a showing of a compelling state interest that was not forthcoming in the court below. Here it suffices to note that facially the statute fits the first standard for an interdistrict violation enunciated in *Milliken* and that neither *Milliken* nor any other case suggests otherwise.

Appellants' efforts to avoid this conclusion by claiming that virtually identical statutes were held not to constitute violations in *Milliken* and in *Bradley* v. *School Board of the City of Richmond,* 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court,* 412 U.S. 92 (1973), simply do not stand scrutiny. Unlike

[6] Wilmington and one other district also were inferentially excluded from reorganization by provisions limiting total district enrollment to 12,000 pupils and barring the subdivision of existing districts in the formation of new districts. 14 Del. C. § 1004(c)(2), (3).

the Delaware statute, Michigan's "Act 48" dealt only with the assignment of children *within* the Detroit school district. Indeed as this Court noted, Act 48 rescinded a desegregation plan that "affected only 12 of 21 Detroit high schools and had no causal connection with the distribution of pupils by race between Detroit and the other school districts within the tri-county area." 418 U.S. at 750. Whatever else one may conclude about the Delaware Act, its impact was certainly not limited to the distribution of students within the City of Wilmington and the Wilmington exception certainly was causally connected with the distribution of students in the Wilmington metropolitan area.

In *Richmond,* the 1971 provisions of the Virginia Constitution did deal with the subject of consolidation. But unlike the Delaware statute, the new Virginia Constitution and statutes[7] did not single out Richmond or any jurisdiction having large black student enrollments for separate and disparate treatment. Nor did they freeze the boundaries of Richmond or constitute it a reorganized district as the Delaware Act did with respect to Wilmington. Rather Virginia, as noted in the Fourth Circuit opinion, simply prevented the State Board of Education from "acting alone" to effect a consolidation of Richmond and surrounding systems under the control of a single school board. 462 F.2d at 1067. And this, as the court pointed out, did not materially change the situation that existed under the old constitution and statutes. Accordingly, there was no colorable claim that the 1971 Virginia provisions constituted an interdistrict violation.

What solace appellants derive from other circuit opinions they cite is even more puzzling. In *United*

[7] Va. Const. art. 8, §§ 2, 5(c); Va. Code Ann. § 22-30 (1973).

States v. *Board of Commissioners of the City of Indianapolis, Indiana,* 503 F.2d 68 (7th Cir. 1974), the issue is whether an extension of the political boundaries of Indianapolis without a like reestablishment of school district boundaries constitutes an interdistrict violation. The court of appeals remanded the case to the district court for a determination of this issue in accordance with *Milliken,* this Court denied certiorari, 43 U.S.L.W. 3569 (April 21, 1975), and the United States is urging in the district court that such an interdistrict violation has occurred. In *Higgins* v. *Grand Rapids Board of Education,* 508 F2.d 779, 796 (6th Cir. 1974), the statute discussed merely imposed a requirement of local consent when school district boundaries were to be extended to include politically annexed territory; it bore a remote resemblance to the Virginia constitutional provision but has not the faintest connection with the Delaware statute at issue here.

Far more relevant (although unmentioned by appellants) was the decision in *Hoots* v. *Commonwealth of Pennsylvania,* 359 F. Supp. 807 (W.D. Pa. 1973), *appeal dismissed,* 495 F.2d 1095 (3rd Cir. 1974), *cert. denied,* 419 U.S. 884 (1974), where the district court found that actions under a Pennsylvania statute providing for the reorganization of school districts which resulted in the concentration of black children in particular districts contravened the Fourteenth Amendment. There was no evidence that black children were less segregated under the previous form of organization or even that previous segregation was caused by *de jure* acts; yet the court held that when the state engaged in a general reorganization of school districts it could not intentionally establish or maintain segregated school districts. 359 F. Supp. at 823. So too the Eighth Circuit sitting *en banc* has recently unanimously held that

the continuation of a segregated black school district over a period of time when other districts were being reorganized through annexation gave rise to a duty to merge for purposes of integration. *United States* v. *State of Missouri,* No. 75-1051 (8th Cir., May 14, 1975). While agreeing that the Ferguson district, sought to be included in the merger, had not actively participated in the creation of the segregated Kinloch district, the court said that intentional segregation in the past could "not be ignored in assessing the impact of present inaction which has the effect of maintaining segregation." Slip op. at 9-10. Cf. *United States* v. *State of Texas,* 321 F. Supp. 1043 (E.D. Tex. 1970), *modified and aff'd,* 447 F.2d 421 (5th Cir. 1971), *cert. denied sub nom., Edgar* v. *United States,* 404 U.S. 1016 (1972); *Haney* v. *County Board of Education of Sevier Conty,* 410 F.2d 920 (8th Cir. 1969); 429 F.2d 364 (1970).

In sum, the Delaware statute on its face is an enactment that redraws district lines in a manner contributing to the separation of the races. Neither in *Milliken* nor in any other case has this Court or any other court sustained such a statute. To the contrary, similar enactments have been invalidated by lower courts in several cases.

2. The Interdistrict Segregative Effect of the School Violations

In their zeal to treat *Milliken* as having closed the door on interdistrict remedy, appellants have distorted both the holding and the factual findings of that case. *Milliken* did not hold that for an interdistrict violation to have occurred suburban districts must have participated in the violation (see Appellants' Jurisdictional Statement at 21); rather, this Court made clear that the discriminatory actions of a single district would suffice

if it were demonstrated that these actions affected the schools of other districts. 418 U.S. at 725.

Accordingly, under *Milliken* if a showing is made that *de jure* practices of the central city district had a segregative impact upon the racial composition of suburban schools, the elements of an interdistrict violation are established. Contrary to appellants' assertion, the lower courts in *Milliken* did not weigh the interdistrict effects of central district violations such as the use of optional attendance zones. The court below in this case did conscientiously seek to determine if there were such effects and concluded, reasonably, that the use of optional zones in Wilmington may have affected the composition of suburban schools by encouraging white families to move out of school areas where this *de jure* practice increased segregation and by discouraging white families from moving in.

Appellants have similarly mischaracterized the state transportation subsidy issue in *Milliken*. There, the lower courts were concerned only with the differential nature of Michigan's treatment of *intradistrict* transportation in Detroit and its suburbs. 338 F. Supp. at 589. Here, the court below dealt with a state scheme subsidizing the attendance of children who reside in Wilmington in private schools *outside* the district which, given the virtually all-white composition of private schools, augmented racial disparities between the Wilmington and suburban school district populations (A. 13-14). Whether considered as state action having an interdistrict effect or simply as an illustration of the permeability of district lines in New Castle County which illuminated the character of other governmental acts, Delaware's interdistrict transportation subsidy was far more relevant than the transportation subsidies considered in *Milliken*.

Lastly, the single "isolated instance" of suburban black children attending black public schools in Detroit, which this Court noted in *Milliken* involved only two of the 52 affected districts (418 U.S. at 750), stands in stark contrast to the situation that existed in the Wilmington metropolitan area. In Wilmington during the 1950s black students from seven New Castle County districts not only attended a black high school in the Wilmington district but several black elementary and junior high schools as well (A. 8). Moreover, white students from "virtually all suburban districts" attended white schools in Wilmington, and with respect to one school, attendance of children across district lines continued until the late 1960s (A. 9 n.8). While the court below did not treat withdrawal of the children as an independent violation, it did have a solid basis for concluding that unlike the situations in *Milliken* and *Richmond*, "*de jure* segregation in New Castle County was a cooperative venture involving both city and suburbs" (A. 16). At minimum, this "historic arrangement for interdistrict segregation" (A. 33) was a proper context in which to view subsequent governmental actions contributing to the racial isolation of city from suburbs. On very similar facts involving Louisville and Jefferson County, Kentucky, the Sixth Circuit reinstated after *Milliken* an order for interdistrict remedy. *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* Nos. 73-1403, 1408 (6th Cir., Dec. 11, 1974), *cert. denied,* 43 U.S.L.W. 3571 (April 21, 1975).

3. Racial Containment Through State Housing Policies

This Court's opinion in *Milliken,* joined in by all five members of the majority, explicitly stated that "in its present posture, the case does not present any question

concerning possible state housing violations," 418 U.S. at 728 n.7, noting that the issue had not been considered in the court of appeals. Accordingly, the Court had no occasion to judge the adequacy of the record on housing discrimination made in the trial court.

Milliken does, however, contain important guidance on the relevance of proof of housing discrimination to the quest for an interdistrict school remedy. In stating that a cross district remedy may be warranted if state officials "had contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing or zoning laws," 418 U.S. at 755, Mr. Justice Stewart's concurring opinion delineated an appropriate standard for future cases. The fact that Mr. Justice Stewart did not find the Detroit record sufficient to meet this standard is neither surprising nor prejudicial to appellees in the instant case. For the trial court in *Milliken* (and in *Richmond* as well)[8] simply catalogued a variety of discriminatory housing practices without carefully assessing whether such practices effectively excluded blacks from the suburbs and concentrated them in the city or merely resulted in racially segregated housing patterns within each district. 388 F. Supp. at 587.[9]

Here, in contrast, the court below specifically gauged the interdistrict effects of state housing discrimination,

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[8] In *Richmond* for example, the court of appeals could not conclude from the record whether Richmond's use of discriminatory housing tools was greater or lesser than that of the suburban counties. Thus the court felt unable to determine whether such discrimination had an impact on interdistrict movement. 462 F.2d at 1066.

[9] And, as noted in *Milliken*, the court of appeals expressly stated that it had not considered evidence of housing discrimination or in its effects. 484 F.2d 215, 242 (6th Cir. 1973).

noting for example that the impact of state toleration of real estate discrimination was to deny almost all new housing opportunities to blacks in the suburbs while having a much more marginal impact in the city (A. 11). Similarly, because of the extraterritorial jurisdiction of the Wilmington Housing Authority, it was clear here that suburban county discrimination denied central city black residents the opportunity to occupy public housing in the suburbs (A. 11), whereas in *Richmond* the court of appeals opined that the lack of public housing in the suburbs might only have affected low-income white suburbanites. 462 F.2d at 1066. Thus in this case governmental discrimination in housing clearly had interdistrict effects and clearly helped explain why over a twenty-year period the percentage of black residents living in the suburbs actually declined while the total suburban population increased fivefold (A. 7).

Appellants apparently recognize the damaging impact of these findings to their case for they seek to offer noninvidious explanations for Delaware's discriminatory housing practices. Thus in appellants' view, state sanction for the racially exclusionary code of the real estate board becomes merely an effort to "avoid upsetting established neighborhoods—an admonition in part against 'block-busting' " and racially discriminatory site selection in public housing becomes merely "the erection of public housing where there was a demand for it, *i.e.*, in the city rather than the suburbs" (Appellants' Jurisdictional Statement at 8). No basis for these fanciful interpretations appears either in the record or in fact. Indeed, in characterizing state housing policies as racially discriminatory, the court below did not cut any new ground but simply applied

settled doctrine that state sanction of exclusionary real estate practices and discriminatory site selection in public housing transgresses the Constitution and laws of the United States. See, e.g., *Crow* v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972); *Gautreaux* v. *Romney*, 488 F.2d 731 (7th Cir. 1971); *Shannon* v. *HUD*, 436 F.2d 809 (3rd Cir. 1970). Cf. *United States* v. *Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3671 (June 24, 1975). The only "new" element in this case is that the court below conscientiously sought to determine whether these indisputably illegal housing practices had the effect of containing black people within the City of Wilmington and contributing to the creation of racially segregated school districts in the Wilmington metropolitan area. Its affirmative conclusion is well supported by the record and consistent with the criteria set forth in *Milliken*.

On each count where appellants have attempted to concoct a conflict between the decision of the court below and the ruling in *Milliken*, they have failed to point to any specifics to substantiate their claims.[10] To the contrary, the lower court's conclusion that the record in this case made it necessary to consider interdistrict school desegregation remedies was based upon factual determinations materially different in every respect from those in *Milliken* and upon a precise application of the principles enunciated in that case. In so

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[10] In light of this failure, appellants' further gratuitous charge that the trial court found this Court's judgment in *Milliken* "distasteful" and therefore engaged in a "flagrant rejection" of its duty to follow Supreme Court judgments is unworthy of comment (Appellants' Jurisdictional Statement at 12).

concluding, the trial court also acted consistently with decisions of courts of appeals and district courts rendered both before and after *Milliken*.

B. Invalidation of the Delaware Educational Advancement Act Was Required by the Well Established Equal Protection Doctrine That Racial Classifications Must Fall Unless Supported by a Compelling Justification.

In the previous section it was shown that the decision below is consistent with *Milliken* v. *Bradley* and other decisions dealing with the use of racial considerations in the drawing or redrawing of school district lines. Here we demonstrate that invalidation of Delaware's Educational Advancement Act was consistent with, and indeed dictated by, a larger body of equal protection doctrine holding that state imposed racial classifications must be invalidated where they are not supported by a compelling state interest.

There can be little question that in freezing the school district lines of Wilmington while authorizing boundary changes in virtually all other districts the Delaware legislature placed special burdens within the government process on minorities seeking to end racial segregation in public schools, burdens that were not placed on groups seeking other ends through school district reorganization. The impact of this disparate treatment, which came at a time when the state's dual system still had not been disestablished, was upon the most heavily black district in the state in public school composition, a district containing nearly one half of the total black population of the state. Where a statute so treats racial problems differently from related governmental interests, it clearly constitutes a suspect racial classification. *Lee* v. *Nyquist*, 318 F. Supp. 710

(W.D. N.Y. 1970), *aff'd*, 402 U.S. 935 (1971); *Hunter* v. *Erickson*, 393 U.S. 385 (1969).[11]

While it is true that the determination that a racial classification exists does not end the inquiry, the state bears a heavy burden in seeking to provide compelling justification for its actions. The court below painstakingly analyzed all proferred justifications for the Wilmington exception and found them wanting. The assertion that the Delaware Constitution requested the legislature to muster a two-thirds vote to alter Wilmington boundaries was simply erroneous under Delaware law (A. 25-27). The claim that historic considerations gave greater sanctity to the Wilmington district lines than to other district boundaries could not be supported, particularly in light of the great variety of state actions demonstrating the permeability of Wilmington's school boundaries and the fact that no other Delaware city was treated in a similar fashion (A. 27-28). Nor was any educational basis established for imposing a maximum enrollment of 12,000 for each district; indeed the weight of testimony by educators was that districts having substantially larger enrollments are sound educational and administrative units (A. 28-30).

Enactments which without any compelling justification treat racial minorities differently from others are no less violative of the equal protection clause when the classification is implicitly racial rather than explicit.

[11] The equal protection claims of plaintiffs in such cases are not impaired by the fact that they may not have had a pre-existing constitutional right to the objective that the state enactment impeded, although this may be deemed a moot point in the instant case where so much independent evidence of interdistrict violations has been adduced. (See pp. 17-22, *supra*.)

Gaffney v. *Cummings*, 412 U.S. 735 (1973); *White* v. *Regester*, 412 U.S. 755 (1973); *Reitman* v. *Mulkey*, 387 U.S. 369 (1961). Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Nor is evidence of racial intent a prerequisite to finding such a violation. *Wright* v. *Council of the City of Emporia*, 407 U.S. 45 (1972).[12]

Cases cited by appellants as evidence that the court below rejected the opinions of this Court are simply inapposite. They involved classifications that were based, if anything, on wealth or class but certainly not race, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *James* v. *Valtierra*, 402 U.S. 137 (1971); cases where the racial impact was extremely remote, e.g., *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); and cases where there was no classification at all and the impact of the challenged action fell upon all racial groups alike, e.g., *Palmer* v. *Thompson*, 403 U.S. 217 (1971). Decisions such as those cited simply illustrate that where the impact of an enactment is not racial, parties claiming to be aggrieved may have difficulty in invoking strict scrutiny of the enactment by this Court. In contrast, where state action however couched has materially disadvantaged racial minorities this Court, remembering the original thrust of the Fourteenth Amendment, has required the highest burden of justification. *Hunter* v. *Erickson, supra; Reitman* v.

[12] The court below prudently withheld any judgment that the Wilmington exclusion was racially motivated (A. 19-20), although state officials admitted that the exception was included in part because of racial hostility to desegregation in white New Castle County (Tr. 1010, 1077). *See also*, 379 F. Supp. at 1227-1228 (Gibbons, J.). The court had no doubt, however, that in terms of its historical context and immediate objective as well as ultimate effect, the Wilmington exception was racially discriminatory (A. 22).

Mulkey, supra; Wright v. *Council of the City of Emporia, supra; Gomillion* v. *Lightfoot, supra; Loving* v. *Virginia,* 368 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964). In finding that appellants failed to justify their actions in singling out black children of Wilmington for separate and disparate treatment the court below was true both to this line of decisions and to the Fourteenth Amendment.

CONCLUSION

This appeal should be dismissed as premature since no injunctive order requiring interdistrict relief has yet issued and determinations still to be made in the court below may make it unnecessary for this Court ever to reach the questions pressed by appellants.

If this Court should reach the merits, the decision below should be summarily affirmed as clearly correct. The opinions and record in this case demonstrate that the State of Delaware in several of its manifestations contributed to the maintenance and perpetuation of a system of racially segregated public schools in Wilmington and New Castle County. The standards set for interdistrict relief in *Milliken* v. *Bradley* were plainly met. And the court below faithfully followed the dictates of the Fourteenth Amendment to the Constitution and opinions of this Court in holding that Delaware's reorganization statute could not stand strict

scrutiny and constituted a prohibited racial classification.

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Certificate of Service

It is hereby certified that in compliance with Rule 33(1) of this Court three copies each of this Motion to Dismiss or Affirm have been forwarded by depositing same in a United States mail box, first class or air mail postage prepaid, to the following:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1418

MADELINE BUCHANAN, ET AL.,
Appellants,

vs.

BRENDA EVANS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

BRIEF IN REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

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I. THE CASE IS RIPE FOR APPEAL.

The parallel between this case and *Milliken* v. *Bradley*, 418 U. S. 717 (1974), already described in Appellants' Jurisdictional Statement, is now made complete by Appellees' contention that the decision below is not ripe for adjudication by this Court. There, as here, the plaintiffs asserted that in the absence of a formulated plan and judgment thereon, the case should not be decided by this Court. The decision in *Milliken*, over the objection of dissenting Justices, was that the case was reviewable at the point of a trial court order for submission of an interdistrict plan. Again, the case here is stronger than *Milliken*.

Despite assertion of the Appellants to the contrary, the court below enjoined the enforcement of a state statute. The order of the three-judge court below, whose jurisdiction was invoked only because injunction against the enforcement of the Educational Advancement Act was sought, reads in part as follows:

> In preparing any inter-district plan, the Defendant State Board of Education *is enjoined* from relying upon those provisions of the Educational Advancement Act of 1968 found unconstitutional by this Court. [Jurisdictional Statement, A46. Emphasis added.]

The decision below was not merely a declaration of invalidity of the Educational Advancement Act but an injunction against its enforcement.

II. THE EDUCATIONAL ADVANCEMENT ACT MADE NO RACIAL CLASSIFICATIONS.

In arguing the merits, the Appellees assert that the Educational Advancement Act invoked racial classifications. The falsity of that proposition was demonstrated in our Jurisdictional Statement. We repeat here only the fact that there is no more basis for drawing such an inference from this statute than existed in this Court's decisions dealing with other statutes where similar arguments were futilely asserted. See, *e.g.*, *Jefferson* v. *Hackney*, 406 U. S. 535, 537-38 (1972); *James* v. *Valtierra*, 402 U. S. 137 (1971); *Palmer* v. *Thompson*, 403 U. S. 217 (1971); *San Antonio Independent School District* v. *Rodriquez*, 411 U. S. 1 (1973). *Cf.* 20 U. S. C. § 1715, which unlike the statute in question here does direct itself to school desegregation.

CONCLUSION.

If *Milliken* v. *Bradley* is still "the law of the land," the judgment below should be reversed summarily. Unless *Milliken* v. *Bradley* is to be overruled *sub silentio*, this Court cannot conscientiously affirm the judgment below or dismiss this appeal.

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PETITION FOR REHEARING.

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

On 17 November 1975, the Court in effect disposed of the appeal in this case by the single word: "Affirmed." "One is left to ask why. The Court never said." *Bickel, The Morality of* Consent 28 (1975).

Although we recognize that all petitions for rehearing are presumptuous, we believe that we have solid grounds for our presumption here. We do not direct ourselves to any of the

read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."

3. *The Court's judgment may be interpreted as overruling* *Milliken* v. *Bradley*, 418 U. S. 717 (1974). Inasmuch as the instant case and *Milliken* v. *Bradley*, 418 U. S. 717 (1974), are four-square on the facts, some persons have interpreted the Court's judgment of affirmance to mean that the Court has reversed its position in *Milliken*. The device of a summary affirmance has been used before to overrule prior authority. For example, *Tyson* v. *Banton*, 273 U. S. 418 (1927), was thus overruled *sub silentio* when *Gold* v. *DiCarlo*, 235 F. Supp. 817 (S. D. N. Y. 1964), was affirmed by per curiam order without briefs or argument in 380 U. S. 520 (1965). Credence is lent this interpretation by the persistent refusal of the lower courts to find *Milliken* applicable to their cases, and the reiterated refusal of this Court to review those judgments. See, *e.g.*, *Newburg Area Council* v. *Bd. of Education of Jefferson County, Ky.*, 510 F. 2d 1358 (6th Cir. 1974), *cert. den.* 43 U. S. Law Week 3571 (22 April, 1975); *United States* v. *Missouri*, 515 F. 2d 1365 (8th Cir. 1975), *cert. den.* 44 U. S. Law Week 3280 (11 Nov., 1975); *United States* v. *School District of Omaha*, 521 F. 2d 530 (8th Cir. 1975), *cert. den.* 44 U. S. Law Week 3280 (11 Nov., 1975). If this is, indeed, the meaning of the Court's action in this case, it behooves the Court to say so. For, as Mr. Justice Jackson said in *Magnolia Petroleum Co.* v. *Hunt*, 326 U. S. 430, 447 (1944): "Overruling a precedent always introduces some confusion and the necessity for it may be unfortunate. But it is as nothing to keeping on our books utterances to which we ourselves will give full faith and credit only if the outcome pleases us."

4. *The Court's judgment may be interpreted as an affirmance on the merits that the case below is distinguishable from Milliken* v. *Bradley*. The trial court sought to distinguish *Milliken*

on two grounds. First, that there was evidence here as to interdistrict housing violations that were not considered in *Milliken*. Second, that the interdistrict violation consisted of the state statute, the Education Advancement Act of 1968. It is, we submit, important to know whether this Court's action was such a substantive ruling and, if so, on which ground. For implicit in such a ruling is a rejection of earlier decisions of this Court. The housing evidence is not so strong for plaintiffs here as it was either in *Milliken* or in *Bradley* v. *School Board of the City of Richmond*, 338 F. Supp. 67 (E. D. Va. 1970), *rev'd*, 462 F. 2d 1058 (CA 4th, 1972), *aff'd by an equally divided Court*, 412 U. S. 92 (1973). If the statute constituted the interdistrict violation, the ruling is inconsistent with this Court's decisions in *Jefferson* v. *Hackney*, 406 U. S. 535, 537-38 (1972); *James* v. *Valtierra*, 402 U. S. 137 (1971); *Palmer* v. *Thompson*, 403 U. S. 217 (1971); *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1 (1973). Each of these decisions is an important precedent whose vitality would be brought in question if this is the proper interpretation of the Court's judgment in this case.

5. *Further proceedings in this case are dependent on a clarification of the Court's judgment.* The position taken by the dissenters in this court, as well as some of the above-stated interpretations of this Court's judgment, leaves it unclear whether further proceeding in this case should be carried on by a three-judge court or by a single district judge. Cf. *Hagans* v. *Lavine*, 415 U. S. 528, 544 (1974). The proper resolution of this question will determine not only who the trier of fact is to be, but what course appeals from future judgments by the district court should take, *i.e.*, by appeal to the Court of Appeals for the Third Circuit or by appeal to this Court. Only such a clarification will remove this case from a morass of procedural difficulties that will shadow the final judgment herein and unduly extend the period of litigation.

We respectfully submit, therefore, that this Court should grant rehearing to clarify its judgment, if not to afford argument and briefing on the merits.

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Of Counsel.

Certificate of Counsel.

There is no stay or supersedeas involved. The proceedings below are going forward without interference by this appeal. As counsel for the appellants, I hereby certify that this petition for rehearing is presented in good faith and not for the purposes of delay.

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Counsel for Appellants.